

**DOCKET**

No. 86-1685-CFX  
Status: GRANTED

Title: Florida, et al., Petitioners  
v.  
Hughlan Long, et al.

Docketed:  
April 21, 1987

Court: United States Court of Appeals  
for the Eleventh Circuit

Counsel for petitioner: Collette, Charles T.

Counsel for respondent: Kerns, David V., Melvin Jr., Woodrow  
M., Williams, Stephen D.

Entry	Date	Note	Proceedings and Orders
1	Apr 21 1987	G	Petition for writ of certiorari filed.
2	Apr 21 1987		Appendix of petitioner Florida, et al. filed.
3	Apr 21 1987	G	Motion of Equal Employment Advisory Counsel, et al. for leave to file a brief as amici curiae filed.
4	Apr 30 1987		Brief of respondent David Kerns in support of petition filed.
6	May 13 1987		Order extending time to file response to petition until May 28, 1987.
7	May 13 1987		The above extension applies to all respondents.
8	May 28 1987		Brief of respondents Hughlan Long, et al., and appendix in opposition filed.
9	Jun 16 1987		DISTRIBUTED. September 28, 1987
10	Oct 5 1987		Motion of Equal Employment Advisory Counsel, et al. for leave to file a brief as amici curiae GRANTED.
11	Oct 5 1987		Petition GRANTED. limited to Questions 1, 2(A), 2(B) and 2(C) presented by the petition. *****
14	Nov 10 1987		Order extending time to file brief of petitioner on the merits until November 30, 1987.
15	Nov 27 1987		Joint appendix filed.
16	Nov 27 1987		Brief of petitioners Florida, et al. filed.
17	Nov 30 1987	G	Motion of Equal Employment Advisory Council, et al. for leave to file a brief as amici curiae filed.
18	Nov 30 1987		Record filed.
		*	Certified copy of original record and C.A. proceedings, 4 boxes, received.
20	Dec 11 1987		Order extending time to file brief of respondent on the merits until January 9, 1988.
21	Dec 24 1987		Brief of respondent David Kerns filed.
22	Jan 5 1988		SET FOR ARGUMENT. Monday, February 22, 1988. (3rd case). (1 Hour).
23	Jan 5 1988		CIRCULATED.
25	Jan 9 1988	X	Brief of respondents Hughlan Long, et al. filed.
24	Jan 11 1988		Motion of Equal Employment Advisory Council, et al. for leave to file a brief as amici curiae GRANTED.
26	Feb 3 1988	X	Reply brief of petitioners Florida, et al. filed.
27	Feb 22 1988		ARGUED.

184



**PETITION  
FOR WRIT OF  
CERTIORARI**

86 1685

No. 86-\_\_\_\_\_

Supreme Court, U.S.  
FILED

APR 21 1987

JOSEPH F. SPANGL, JR.  
CLERK

In The  
**Supreme Court of the United States**

October Term, 1986

STATE OF FLORIDA, et al.,

*Petitioners,*

v.

HUGHLAN LONG, S. Dewey Haas, and Carl Rassler,  
individually and on behalf of all retired and present male  
employees subject to the Florida Retirement System estab-  
lished by Chapter 121, Florida Statutes, as well as the  
surviving joint annuitants of any deceased retired male  
employees,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

CHARLES T. COLLETTE  
Counsel of Record

DOUGLAS A. MANG

BRUCE A. MINNICK

Mang, Rett & Collette, P.A.

Post Office Box 11127

Tallahassee, Florida 32302

(904) 222-7710

AUGUSTUS D. AIKENS, JR.

General Counsel

Florida Department of Administration

435 Carlton Building

Tallahassee, Florida 32399-1550

(904) 488-4747

*Attorneys for Petitioners*

43/282

## QUESTIONS PRESENTED FOR REVIEW

(1) In this Title VII sex-discrimination pension benefit case against a state-operated defined-benefit pension plan, does *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983) ("Norris"), bar the award of retroactive relief to pre-August 1, 1983 male retirees (in the form of both retrospective and prospective topping up of optional joint-annuitant pension benefits) as the 9th Circuit held in *Probe v. State Teachers' Retirement System*, 780 F.2d 776 (9th Cir.), cert. denied, — U.S. —, 90 L.Ed.2d 978 (1986) ("Probe"), with respect to a state-operated defined-benefit pension plan in all essential respects identical to the one here at issue, or does *Norris* permit the award of such relief as the 11th Circuit (specifically disagreeing and conflicting with the 9th Circuit's *Probe* decision) has held herein?

(2)(A) Alternatively, should the date of *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) ("Manhart"), rather than the date of *Norris* be deemed herein controlling, do *Manhart* and *Norris* nevertheless bar the award of relief to pre-*Manhart* retirees as the 9th Circuit held in *Retired Public Employees' Ass'n of California v. State of California*, 799 F.2d 511 (9th Cir. 1986), with respect to a state-operated defined-benefit pension plan, or do *Manhart* and *Norris* permit the award of relief to pre-*Manhart* retirees as the 11th Circuit has held herein?

(2)(B) Alternatively, should the date of *Manhart* rather than the date of *Norris* be deemed herein controlling, does *Norris* nevertheless compel proration of the award

of retirement benefits herein to reflect only those benefits attributable to post-*Manhart* contributions?

(2)(C) Alternatively, should the date of *Manhart* rather than the date of *Norris* be deemed herein controlling, must the class of pre-August 1, 1983 retirees include only those males (or their surviving joint annuitants) who retired no more than 300 days prior to the filing of an appropriate EEOC administrative charge of discrimination by a proper named representative plaintiff, and must the liability cut-off date for the award of relief extend back no more than two years prior to the filing of such EEOC charge?

(3) In any event, and in light of the adverse final state appellate court judgment against respondent Hughlan Long in this case, see *Long v. Dep't of Administration, Div. of Retirement*, 428 So.2d 688 (Fla. 1st DCA 1983), do *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), and its progeny bar respondent Long's Title VII claims herein under either collateral estoppel/issue preclusion or res judicata/claim preclusion?

(4) In any event, and should respondent Long's remaining Title VII claims be found barred by either collateral estoppel or res judicata, must this case be dismissed for lack of a remaining named representative plaintiff who has exhausted Title VII administrative remedies?

## PARTIES TO THE PROCEEDING

Petitioners in this Court—the STATE OF FLORIDA, BOB MARTINEZ in his official capacity as Governor of the State of Florida,<sup>1</sup> ADIS MARIA VILA in her official capacity as Secretary (i.e., chief executive officer) of the State's Department of Administration,<sup>2</sup> and ANDREW J. McMULLIAN, III, in his official capacity as Director (i.e., chief executive officer) of the Division of Retirement in the State's Department of Administration—were appellants/cross-appellees in the 11th Circuit and defendants in the trial court (the U.S. District Court for the Northern District of Florida, Tallahassee Division).

Respondents in this Court—initial plaintiffs HUGHLAN LONG and S. DEWEY HAAS and intervening plaintiff CARL RASSLER—were appellees/cross-appellants in the 11th Circuit and plaintiffs in the trial court.

Additionally, there are two plaintiff subclasses in this case. The first is a noticed subclass (subclass "A") which consists of those males who retired under the Florida Retirement System ("FRS") after March 24, 1972 (the date Title VII was made applicable to the States), and before

<sup>1</sup>By operation of *Fed.R.App.P.* 43(c)(1), Bob Martinez has been substituted in place of Robert Graham, the previous Governor of Florida.

<sup>2</sup>By operation of *Fed.R.App.P.* 43(c)(1), Adis Maria Vila has been substituted in place of Gilda Lambert, the previous Secretary of the State's Department of Administration ("DOA"). In turn, by operation of *Fed.R.Civ.P.* 25(d)(1), Gilda Lambert was earlier substituted in place of Nevin Smith, who was Secretary of DOA at the time of the events herein complained of and an initially named defendant in the trial court (see Appendix hereto at A38, ¶2, & A101, ¶2).



August 1, 1983, and who elected one of the three FRS optional joint-annuitant retirement benefits (either Option 2, 3, or 4). This first noticed subclass also includes the surviving joint annuitants or beneficiaries of any such deceased male retirees.

The second is an unnoticed subclass (subclass "B") which consists of those males who retired under the FRS on or after August 1, 1983, and who also elected FRS joint-annuitant retirement benefit Option 2, 3, or 4, or the surviving joint annuitants or beneficiaries of any such deceased male retirees. This second unnoticed subclass also includes those presently unretired male members of the FRS, whether or not currently employed by the State or one of its 1,100 plus FRS participating political subdivisions, who have obtained a vested right to receive retirement benefits under the FRS upon reaching age of retirement (*see* Appendix hereto at A45, ¶39, & A107, ¶39).<sup>3</sup>

Finally, DAVID V. KERNS, ESQUIRE (former General Counsel of the State's Department of Administration), is a noticed unnamed class member herein appearing on his own behalf. While technically a class member respondent in this Court, Mr. Kerns testified on the State's behalf at the district court trial in this matter and subse-

---

<sup>3</sup>As for this second post-August 1, 1983 subclass, the district court found the unisex mortality tables adopted by the State effective August 1, 1983, "do produce an equal monthly benefit for identically situated males and females retiring on or after August 1, 1983" (*see* Appendix hereto at A53, ¶44), and awarded them no relief. This denial of relief was not appealed to the 11th Circuit, and thus this post-August 1, 1983 subclass and the denial of relief thereto can and will not be before this Court.

quently filed a brief on the State's behalf in the 11th Circuit.

Similarly, JUDSON FREEMAN, ESQUIRE, is a noticed unnamed class member herein appearing on his own behalf. He took no known active involvement in either the district court or 11th Circuit proceedings.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW _____	i
PARTIES TO THE PROCEEDING _____	iii
TABLE OF CONTENTS _____	vi
TABLE OF AUTHORITIES _____	vii
PREFACE REGARDING PARTY & RECORD REFERENCES _____	xi
OPINIONS BELOW _____	1
JURISDICTION _____	2
STATUTES INVOLVED _____	3
STATEMENT OF THE CASE _____	4
I. <i>Proceedings Below</i> _____	4
II. <i>Facts Re Florida Retirement System</i> _____	7
III. <i>Facts Re Plaintiffs</i> _____	12
REASONS FOR GRANTING THE WRIT _____	14
I. Question (1) _____	14
II.A. Question (2)(A) _____	18
II.B. Question (2)(B) _____	20
II.C. Question (2)(C) _____	21
III. Question (3) _____	24
IV. Question (4) _____	27
CONCLUSION _____	30

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Albermarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) —	17
<i>Arizona Governing Committee for Tax Deferred Annuity &amp; Deferred Compensation Plans v. Nor- ris</i> , 463 U.S. 1073 (1983) (“Norris”) —	passim
<i>Bazemore v. Friday</i> , 478 U.S. —, 92 L.Ed.2d 315 (1986) —	22, 23, 24
<i>Blum v. Yaretsky</i> , 457 U.S. 991 (1982) —	29
<i>Burney v. Polk Community College</i> , 782 F.2d 1374 (11th Cir. 1984) —	26
<i>City of Los Angeles, Dep’t of Water &amp; Power v. Manhart</i> , 435 U.S. 702 (1978) (“Manhart”) —	passim
<i>Clissuras v. City of New York Teachers’ Retire- ment Bd.</i> , 55 U.S.L.W. 3310 & 3321 (2d Cir., filed March 31, 1986), <i>cert. denied</i> , — U.S. —, 93 L.Ed. 2d 357 (Sup. Ct. #86-474, Nov. 3, 1986), <i>reh. de- nied</i> , — U.S. —, 93 L.Ed.2d 862 (Jan. 12, 1987) —	23
<i>Crown, Cork &amp; Seal Co. v. Parker</i> , 462 U.S. 345 (1983)	28
<i>Delaware State College v. Ricks</i> , 449 U.S. 250 (1980) —	22, 28
<i>Falcon v. General Telephone Co. of the Southwest</i> , 611 F.Supp. 707 (N.D. Tex. 1985), <i>on remand from</i> , 457 U.S. 147 (1982) —	29
<i>Franks v. Bowman Transportation Co.</i> , 424 U.S. 747 (1976) —	28
<i>General Telephone Co. of the Southwest v. Falcon</i> , 457 U.S. 147 (1982) —	29
<i>Hannahs v. N.Y. State Teachers’ Retirement Sys- tem</i> , 26 F.E.P. Cases 527 (S.D. N.Y. 1981), <i>later decision</i> , No. 78 Civ. 2541-CSH (S.D. N.Y., filed March 9, 1987) —	23



## TABLE OF AUTHORITIES (Cont'd)

	Page
<i>Hannahs v. N.Y. State Teachers' Retirement System</i> , No. 78 Civ. 2541-CSH (S.D. N.Y., filed March 9, 1987), <i>earlier decision</i> , 26 F.E.P. Cases 527 (S.D. N.Y. 1981) _____	14
<i>Hirst v. State of California</i> , 770 F.2d 776 (9th Cir. 1985) _____	25
<i>Jackson v. Seaboard Coast Line R. Co.</i> , 678 F.2d 992 (11th Cir. 1982) _____	27
<i>Kremer v. Chemical Construction Corp.</i> , 456 U.S. 461 (1982) _____	ii, 24, 25, 26, 27
<i>Long v. Dep't of Administration, Div. of Retirement</i> , 428 So.2d 688 (Fla. 1st DCA 1983) —ii, 7, 12, 24, 25	
<i>Long v. State of Florida</i> , 805 F.2d 1542 (11th Cir. 1986), <i>cert. pending</i> _____	<i>passim</i>
<i>Marrese v. American Academy of Orthopedic Surgeons</i> , 470 U.S. —, 84 L.Ed.2d 274 (1985) _____	24, 25, 27
<i>Probe v. State Teachers' Retirement System</i> , 780 F.2d 776 (9th Cir.), <i>cert. denied</i> , — U.S. —, 90 L.Ed.2d 978 (1986) ("Probe") _____	i, 5, 14, 15, 16
<i>Retired Public Employees' Ass'n of California v. State of California</i> , 799 F.2d 511 (9th Cir. 1986) ("Retired Public Employees") _____	i, 14, 18, 19, 20
<i>School Bd. of Leon County v. Hargis</i> , 400 So.2d 103 (Fla. 1st DCA 1981) _____	26
<i>Sosna v. Iowa</i> , 419 U.S. 393 (1975) _____	28
<i>Spirit v. Teachers' Ins. &amp; Annuity Ass'n</i> , 735 F.2d 23 (2d Cir.), <i>cert. denied</i> , 469 U.S. 881 (1984) ("Spirit II") _____	14, 15, 16
<i>Unger v. Consolidated Foods Corp.</i> , 693 F.2d 703 (7th Cir. 1982), <i>cert. denied</i> , 464 U.S. 1017 (1983) —	27
<i>United Air Lines, Inc. v. Evans</i> , 431 U.S. 553 (1977) —	28

## TABLE OF AUTHORITIES (Cont'd)

	Page
<i>Vuyanich v. Republic Nat'l Bank of Dallas</i> , 723 F.2d 1195 (5th Cir.) <i>cert. denied</i> , 469 U.S. 1073 (1986) _____	29
<i>Wakeen v. Hoffman House, Inc.</i> , 724 F.2d 1238 (7th Cir. 1983) _____	27, 29
<i>Zipes v. Trans World Airlines, Inc.</i> , 455 U.S. 385 (1982) _____	27
CONSTITUTIONAL PROVISIONS	
U.S. Const., Art. III _____	5, 6
Fla. Const., Art. III, § 3(b) _____	9
Fla. Const., Art. III, § 3(d) _____	9
STATUTES	
Title VII, Civil Rights Act of 1964 _____	<i>passim</i>
Sections 703 & 706, Title VII, Civil Rights Act of 1964 —	3
28 U.S.C. § 1254(1) _____	2
28 U.S.C. § 1291 _____	2
28 U.S.C. § 1292(a)(1) _____	2
28 U.S.C. § 1343 _____	2
28 U.S.C. § 1738 _____	24, 25, 26
42 U.S.C. § 1983 _____	2
42 U.S.C. § 2000e-2(a)(1) _____	3
42 U.S.C. § 2000e-5(e) _____	3
42 U.S.C. § 2000e-5(g) _____	3, 6, 24
78 Stat. 255 _____	3
78 Stat. 259 _____	3

## TABLE OF AUTHORITIES (Cont'd)

	Page
86 Stat. 104 .....	3
86 Stat. 109 .....	3
Ch. 86-137, §§ 2 & 3, <i>Laws of Fla.</i> (1986) .....	3, 4, 10
<i>Fla.Stat.</i> Ch. 23, Part IX (1981) .....	26
<i>Fla.Stat.</i> Ch. 760 (1985) .....	26
<i>Fla.Stat.</i> §§ 23-161-.167 (1981) .....	26
<i>Fla.Stat.</i> § 112.66(9) (1985) .....	4
<i>Fla.Stat.</i> § 121.052(4) .....	8
<i>Fla.Stat.</i> § 121.061 (1985) .....	4
<i>Fla.Stat.</i> § 121.071 (1985) .....	4
<i>Fla.Stat.</i> § 121.071(2) .....	8
<i>Fla.Stat.</i> § 121.091(1) (1985) .....	4
<i>Fla.Stat.</i> § 121.091(6) (1985) .....	4
<i>Fla.Stat.</i> § 760.01 (1985) .....	26
<i>Fla.Stat.</i> §§ 760.01-.10 (1985) .....	26
REGULATIONS	
43 <i>Fed.Reg.</i> 39775 (1978) .....	21
RULES OF PROCEDURE	
<i>Fed.R.App.P.</i> 43(c)(1) .....	iii
<i>Fed.R.Civ.P.</i> 25(d)(1) .....	iii
OTHER AUTHORITIES	
Hager & Zempleman, <i>The Norris Decision, Its Implications &amp; Applications</i> , 32 <i>Drake L. Rev.</i> 913 (1983) .....	21

## PREFACE REGARDING PARTY &amp; RECORD REFERENCES

Respondents herein were plaintiffs in the trial court. Accordingly, for ease of reference they will be referred to herethroughout simply as "plaintiffs." Should it be necessary to refer to any one of them individually, he will be referred to by the word "plaintiff" followed by his last name, e.g., "plaintiff Long." Similarly, the noticed pre-August 1, 1983 retiree subclass herein (subclass A) will be referred to herethroughout as the "class" or the "plaintiff class." Should it be necessary to refer to any one of them individually, he will be referred to by the words "class member" followed by his last name, e.g., "class member Samaha."

Further, should it be necessary to refer to the unnoticed subclass of persons retiring on or after August 1, 1983 (subclass B),<sup>4</sup> they will be referred to as the "post-August 1, 1983 retirees."

Petitioners herein were defendants in the trial court. They will be referred to herethroughout simply as "the State" or as "defendants." Should it be necessary to refer to any one of them individually, he or she will be referred to by name or title, e.g., "defendant Smith" or "Secretary Smith."<sup>5</sup>

Additionally, please note that records on appeal in the 11th Circuit are not consecutively page numbered. Rather they are organized, first, into volumes of consecutively numbered documents and, last, into volumes of con-

<sup>4</sup>See n.3 herein, *supra* at p. iv.

<sup>5</sup>See n.2 herein, *supra* at p. iii.

secutively dated transcripts—with exhibits filed separately. The 11th Circuit's method of record reference reflects this, and that method will be used herethroughout.

Specifically, a record document is referred to by a three number cite—the first being the volume, the second being the document number, and the third being the page number(s) of the document (counting down from the top). By way of example, the record cite to plaintiffs' amended complaint upon which this matter proceeded would be "R4-55-3 to 11."

In contrast, a transcript is referred to by a two number cite—the first being the volume, and the second being the page number(s) of the transcript where the testimony appears. By way of example, the record cite to the direct testimony of defendants' actuarial expert (Michael Tierney) would be "R19-100 to 180."

Finally, just as in the 11th Circuit, exhibits admitted at the February 1986 final hearing will be clearly identified as plaintiffs' or defendants'. They will be referred to as "P.Ex." or "D.Ex." followed, where appropriate, by a page number(s) (counting down from the top). By way of example, the exhibit reference to intervening plaintiff Carl Rassler's EEOC administrative material would be "D.Ex. 31-1 to 11." If an exhibit was not admitted but was proffered (which occurred with respect to defendants' national impact exhibits<sup>6</sup>), such will be clearly indicated, e.g., "Prof.D.Ex. 10A1."

---

<sup>6</sup>The State's proffered national impact exhibits were 10A1 through 10A5 and 10B1; all but 10B1 were federal publications.

---

In The  
**Supreme Court of the United States**

October Term, 1986

---

STATE OF FLORIDA, et al.,

*Petitioners,*

v.

HUGHLAN LONG, et al.,

*Respondents.*

---

**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

---

**OPINIONS BELOW**

The decision of the 11th Circuit (Appendix at A1-A22) is reported at 805 F.2d 1542.<sup>7</sup> The judgment of the district court (A33-A34), that judgement's underlying order (A35-A36), and the two orders of March 31, 1986, and March 16, 1984, incorporated therein (respectively, A37-A70 & A71-A83) are not reported. As above indicated, all are reprinted in the Appendix hereto at the pages indicated.

---

<sup>7</sup>The permanently bound volume of the Federal Reporter where this case is reported, 805 F.2d 1542, contains the corrections noticed in counsel's letter of December 24, 1986 (Appendix at A23-A24), see 805 F.2d at 1545 n.2 & 1545 second column.



## JURISDICTION

Plaintiffs initially sought relief under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), 42 U.S.C. § 1983, and pendent state law claims. They invoked the district court's 28 U.S.C. § 1343 and pendent state claim jurisdiction. On March 16, 1984, the district court granted defendants partial summary judgment and dismissed plaintiffs' § 1983 and pendent state law claims (respectively, A74-A75, ¶ 7, & A74, ¶ 6). That dismissal was not appealed to the 11th Circuit, and thereafter this case proceeded solely on plaintiffs' Title VII claims.

Following the district court's March 31, 1986 order (A37-A70), defendants timely invoked the 11th Circuit's jurisdiction under 28 U.S.C. § 1292(a)(1), and plaintiffs subsequently cross-appealed. Following the district court's May 29, 1986 judgment (A33-A34), defendants timely invoked the 11th Circuit's jurisdiction under 28 U.S.C. § 1291, and plaintiffs subsequently cross-appealed. On July 7, 1986, acting on defendants' emergency motion for stay pending appeal, the 11th Circuit granted the requested stay, consolidated the two appeals, and expedited this case (A33).

The 11th Circuit rendered its decision on December 19, 1986 (A1-A22), and denied plaintiffs' petition for rehearing on February 19, 1987 (A25-A26).<sup>8</sup> The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

—○—

<sup>8</sup>The 11th Circuit's denial of rehearing is reported in the permanently bound volume of 805 F.2d at 1552.

## STATUTES INVOLVED

This case involves §§ 703 & 706 of Title VII of the Civil Rights Act of 1964 as amended [78 Stat. 255 & 86 Stat. 109; 78 Stat. 259 & 86 Stat. 104]—42 U.S.C. § 2000e-2(a)(1) and 42 U.S.C. §§ 2000e-5(e) & (g). It also involves *Fla.Stat.* § 112.66(9) relating in general to the operation of Florida government pension plans, and selected provisions of Chapter 121, Florida Statutes, relating to the operation and administration of the Florida Retirement System (FRS), as well as §§ 2 & 3 of Chapter 86-137, Laws of Florida (1986), whereby the 1986 Florida Legislature amended the FRS contribution rates effective October 1, 1986.

42 U.S.C. § 2000e-2 provides in relevant part:

(a) *Employers.* It shall be an unlawful employment practice for an employer—

(1) . . . to discriminate against any individual with respect to his compensation . . . or privileges of employment, because of such individual's . . . sex . . . .

42 U.S.C. § 2000e-5(e) provides in relevant part:

(e) *Time for filing charges.* A charge under this section . . . shall be served upon the person against whom such charge is made within ten days thereafter . . . [and] such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred . . . .

42 U.S.C. § 2000e-5(g) provides in relevant part:

*Injunctions affirmative action; equitable relief.* If the court finds that the respondent has intentionally engaged in or is engaging in an unlawful employment practice charged in the complaint, the

court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, . . . back pay . . . , or any other relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. . .

*Fla.Stat.* § 112.66(9) is set forth in the Appendix hereto at A128. *Fla.Stat.* § 121.061 is set forth in the Appendix at A129-A130; § 121.071 at A131-A134; § 121.091 (1) at A135-A136; and § 121.091(6) at A137-A139. Sections 2 & 3 of Chapter 86-137, Laws of Florida (1986), are set forth in the Appendix at A140-A147.

## STATEMENT OF THE CASE\*

### I. Proceedings Below

The initial portion of the 11th Circuit's opinion before Part I, 805 F.2d at 1544-45 (A6-A7), accurately summarizes the proceedings below as to the relief ordered in this case. In sum, that relief amounted to an award of approximately \$43.6 million in additional pension benefits to the pre-August 1, 1983 class—(1) approximately \$11.3 million in retrospective adjustment of pension benefits to that portion of the plaintiff class who retired subsequent to Octo-

\*The Court should note that because of this case the State of Florida filed an amicus brief on the merits in *Norris* (Sup.Ct. #82-52) and an amicus brief in support of the petition for writ of certiorari in *Teachers' Insurance & Annuity Ass'n v. Spirit* (Sup.Ct. #84-50). The Court may find an examination of those amicus briefs helpful to its understanding of the instant case.

ber 1, 1978, and prior to August 1, 1983; (2) approximately \$32.3 million in present day dollars in prospective adjustment of pension benefits (with an effective commencement date of April 30, 1986) to the entire plaintiff class.

In affirming this award of relief, 805 F.2d at 1548-51 (A16-A21), the 11th Circuit specifically disagreed and conflicted with, *Id.* at 1548 (A13-A14), the 9th Circuit's decision in *Probe v. State Teachers' Retirement System*, 780 F.2d 776 (9th Cir.), *cert. denied*, — U.S. —, 90 L.Ed.2d 978 (1986)—the application of which would have completely barred the award in this case.

Additionally, there are several matters not readily apparent from the 11th Circuit's decision which need to be further delineated for the purpose of this petition.

First, in urging *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983) ("*Norris*"), barred the award of relief to plaintiffs and the plaintiff class (*see* first "Question Presented for Review" herein, *supra* at p. i), the State presented such in the context of lack of Article III jurisdiction. Specifically the State urged that, because *Norris* barred the award of relief to plaintiffs and the plaintiff class, they had no redressable injury and thus Article III jurisdiction was lacking over their claims (*see* R5-2663-1 and 6 to 1<sup>d</sup>; *see also* R4-89-1 to 6). In its order of March 16, 1984, the district court found *Norris* did not preclude the award of relief in this case (A77-A83, ¶ 12), and this explains its denial in that same order of the State's motion to dismiss for lack of Article III jurisdiction (A75, ¶ 8).

The issue was also presented to the 11th Circuit in the context of lack of Article III jurisdiction, and Question

(1) herein, *supra* at p. i, likewise encompasses this same lack of redressable injury Article III consideration.

Second, the importance of the October 1, 1978 cut-off date must be underscored. For the purposes of this case it is the unchallenged pre-/post- *Manhart* compliance date, *see* 805 F.2d at 1549 n.7 (A16 n.7). The district court held October 1, 1978, was the date by which the State reasonably could have complied with this Court's April 1978 decision in *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) ("*Manhart*") (*see* A66), and this October 1, 1978 *Manhart* compliance date was unchallenged in the 11th Circuit, except that defendants maintained at both the trial and appellate levels there should be a later liability cut-off date because of the two-year requirement of 42 U.S.C. § 2000e-5(g) (*see, e.g.*, R4-69-7, ¶ 47).<sup>10</sup>

Third, the State raised in the district court the failure of plaintiff Haas, intervening plaintiff Rassler, and class member Samaha to satisfy the administrative exhaustion requirements of Title VII (*see, e.g.*, A99-A100; A119-A120, ¶¶ 10-11; A122-A123, ¶¶ 12-14, & A124-A126, ¶¶ 23-36; *see also, e.g.*, R4-69-7, ¶ 45; R4-89-18 to 20; R5-2663-2 & 22 to 25; R9-2818-11 to 13; R10-2795-19; R13-2888-12 to 16 & 9 to 12, ¶¶ 34-43; R13-2889-1 to 3; *see also, e.g.*, R18-72 to 73; R21-149 to 155). Only as to plaintiff Long was it agreed

<sup>10</sup>Accordingly, the reference "pre-*Manhart* retirees" herein refers to that portion of the plaintiff class who retired prior to October 1, 1978 (and after March 24, 1972). Under the structure of the district court's judgment (A33-A34) and order (A35-A36), these pre-*Manhart* retirees were awarded only prospective adjustment of pension benefits. Thus, the post-*Manhart* portion of the plaintiff class (those persons who retired after October 1, 1978, and before August 1, 1983) were awarded both prospective and retrospective adjustment of pension benefits.

he had exhausted the administrative prerequisites for bringing a Title VII action in federal court (*see, e.g.*, R4-57-1, ¶ 3, *in conjunction with*, R14-73, lines 16-21, & 16, lines 14-18).<sup>11</sup> The only evidence submitted on this at the February 1986 final hearing in this cause was that of defendants, and it established without rebuttal that plaintiffs Haas and Rassler, as well as class member Samaha, had failed to satisfy Title VII's administrative exhaustion requirements (*see* R19-29 to 32; D.Ex. 30; D.Ex. 31; re Haas, *see also* R5-2662-48 & 49, Exhibits "C" & "D"; re Rassler, *see also* R8-2737-6 & 9; re class member Samaha, *see also* R8-2740-3; P.Ex. 27).

These administrative exhaustion issues, including lack of a remaining named representative plaintiff who had properly exhausted Title VII administrative remedies should plaintiff Long's Title VII claims be found barred by either collateral estoppel or res judicata, were also raised in the 11th Circuit.

## II. Facts Re Florida Retirement System

Part I of the 11th Circuit's decision, 805 F.2d at 1545-46 (A7-A9), accurately summarizes facts re the FRS so far as it goes. Again, however, there are several matters not readily apparent from the 11th Circuit's decision which need to be further delineated or corrected for the purposes of this petition.

First and foremost is that all retirees under the FRS obtain a vested contractual right to the full amount of

<sup>11</sup>Plaintiff Long's problem, however, is whether the final state appellate court judgment against him, *see Long v. Dep't of Administration, Div. of Retirement*, 428 So.2d 688 (Fla. 1st DCA 1983), bars his Title VII claims herein under either collateral estoppel/issue preclusion or res judicata/claim preclusion.



their retirement benefits which prevents the State from thereafter ever reducing the same (*see* A39, ¶ 7, & A46, ¶¶ 40-41; A102, ¶ 7, & A109, ¶¶ 40-41; *see also* R19-83 to 84).

Second, there is no dispute that the award in this case would be paid by the FRS (the plan) or its 1,100 plus participating governmental employers through increased contribution rates (A68; *see also, e.g.,* R18-204; R19-17 to 18 & 149 to 151).

Third, the State adopted unisex mortality tables for the calculation of its three forms of optional joint-annuitant benefits effective August 1, 1983, because of this Court's *Norris* decision (*e.g.,* R19-21 to 22; D.Ex. 27). This lawsuit had nothing to do with it (R18-108; R19-22). Indeed, because of this the post-August 1, 1983 retirees (subclass B) are not before this Court (*see* n.3 herein, *supra* at p. iv).

Fourth, the FRS is funded solely by contributions calculated as a percentage of employee payroll (*e.g.,* R18-181; *see also Fla.Stat.* § 121.052(4) (A140-A144) & § 121.071(2) (A131-A132; A145-A146)).<sup>12</sup> The level of needed contri-

<sup>12</sup>As with any retirement plan, those contributions (following collection and receipt) are then invested and produce investment income (*see, e.g.,* D.Exs. 32 & 34; D.Exs. 21 to 26).

It should also be noted that the FRS has three classes of membership—Regular, Special Risk, and Elected State Officers—of which the regular class constitutes about 95% of the total employee membership (*e.g.,* R18-174). At the time of the February 1986 final hearing the FRS had approximately 418,000 active employee members of whom 45%, or about 175,000 people, were employees of Florida's 67 local school boards (R18-179 to 181); it also had in excess of 84,000 retired members (R18-172; R19-90). Further, all persons who retired through 1983 (*i.e.,* plaintiffs and the plaintiff class) had personal contributions in the fund (R20-48 to 49).

butions is determined biennially by the Florida Legislature, based upon the State's consulting actuaries' actuarial reviews (*e.g.,* R18-181), which assess assumptions from the previous two-year review period versus subsequent experience to determine what contribution rate is required to keep the FRS in actuarial balance (*compare, e.g.,* D.Exs. 32 & 34; *see also* R19-136; *see generally* R19-119 to 146).

Fifth, and in relation to the fourth item above, the 1984 Legislature adopted an increase in contribution rates which was 24 basis points (.24%) over that recommended by the State's consulting actuaries in their 1983 FRS Actuarial Review as necessary in their opinion to keep the FRS in actuarial balance (*see* A41-A42, ¶¶ 19-20; A104-A105, ¶¶ 19-20; *see also* R18-204 & 205). This increase resulted from legislative compromise arising from the Florida Auditor General's criticisms (D.Ex. 12) of the consulting actuaries' 1983 Actuarial Review (D.Ex. 32) and his concern with the increase in the FRS' unfunded liabilities to over \$6.4 billion in 1984—with a projection to a top of about \$9.0 billion in 1995 (*e.g.,* R18-199 to 205). The additional 24 basis points increase had nothing to do with this lawsuit (R18-204), and would for certain only last until the 1986 session of the Florida Legislature when it was presented with the consulting actuaries' 1985 FRS Actuarial Review—both of which were to occur in the Spring of 1986 following the February 1986 final hearing in this matter (R19-3).<sup>13</sup> Further, the moneys generated by the addi-

<sup>13</sup>And such, indeed, occurred. Following receipt of the State's consulting actuaries' 1985 Actuarial Review the 1986 Florida Legislature, which met in April and May 1986 (*see Fla.*

(Continued on following page)

tional 24 basis points were applied to the unfunded liability; they were not segregated or placed into any separate fund or account (R18-205; R19-2 to 3 & 149 to 150).

Sixth, the 11th Circuit erred when it stated in relation to this 1984 additional 24 basis point increase, 805 F.2d at 1550-51 (A20):

The district court found that the Florida legislature increased the system's contribution rates in 1984, creating a surplus in the fund of over \$200 million. This finding of fact, based primarily on the testimony of the FRS consulting actuary, is supported by sufficient evidence and is not clearly erroneous.

In point of fact, nowhere did the district court find that this additional 24 basis points increase created "a surplus in the fund of over \$200 million" (*see* A67-A68; *see generally* A53-A70). Indeed, the unrebutted and uncontradicted testimony of the State's consulting actuary (and testifying actuarial expert) was that a one basis point increase in FRS contribution rate generates only about \$700 to \$800 thousand per year (R20-41 to 42). Thus, simple

(Continued from previous page)

Const. Art. III, §§ 3(b) & 3(d)), enacted entirely new contribution rates effective October 1, 1986. *See* §§ 2 & 3 of Chapter 86-137, Laws of Florida (1986) (A140-A147); *see also* ¶¶ 2-3, 5-7, & 10-14 of Affidavit of Andrew J. McMullian, III, filed in the 11th Circuit on June 27, 1986, in support of the State's emergency motion for stay pending appeal. In § 3 of Chapter 86-137 the Legislature increased the regular class contribution rates 90 basis points from 12.24 to 13.14% of gross payroll (*see* A145-A146). Likewise in both §§ 2 & 3 the contribution rates for the other two FRS classes (and divisions thereof) were increased in various amounts (A140-A144 & A146), except for the judicial division of the elected state officers class whose contribution rate was reduced 85 basis points from 21.79 to 20.94% of gross payroll (A142-A143).

arithmetic calculation establishes the 1984 Legislature's additional 24 basis points increase generated only about \$33.6 to \$38.4 million for the two years it was in effect until the 1986 Legislature again amended the FRS contribution rates (*see* A140-A147; *see also* ¶¶ 2-3, 5-7 & 10-14 of Affidavit of Andrew J. McMullian, III, filed in the 11th Circuit on June 27, 1986, in support of the State's emergency motion for stay pending appeal).

Seventh, and highly important to note, is that again the unrebutted testimony of the State's actuarial expert established that in a defined-benefit plan, especially one such as the FRS which is funded entirely by contributions, there is a direct connection between contributions and benefits just as in a defined-contribution plan—the only difference being that in a defined-benefit plan the level of the benefit determines the amount of the contribution, while in a defined-contribution plan the level of the contribution determines the amount of the benefit (*see specifically* R19-109 to 110 & 112 to 113; R19-131, lines 4-6; *see generally* R19-108 to 118). Moreover, at and after an individual's retirement both types of plans become exactly identical (R19-113 to 114).

Eighth and finally, proration calculations (i.e., the allocation of benefits to before and after a date certain), using the April 1978 date of *Manhart*, were performed in this case under both "contribution" and "accrued benefit" methodologies for each of the levels of monetary relief contemplated by the district court (*see* A113-A117 & A50-A53, *in conjunction with*, A90, ¶ C). Those calculations were done by Michael Tierney, the State's actuarial expert (*see specifically* R191-159 to 160; *see generally* R19-151 to 162; *see also* R19-195 to 196; R20-42 to 43).

### III. Facts Re Plaintiffs

Plaintiff Long retired as of July 1982 under FRS joint-annuitant Option II (R19-23 to 24). His previous employer was the State's Department of Labor & Employment Security (R19-24), and his only EEOC charge of discrimination was filed October 7, 1981 (R19-25; D.Ex. 29-3). That charge named as respondent the State of Florida, Department of Administration, Division of Retirement (R19-25; D.Ex. 29-3), and was transmitted thereto by the EEOC on December 2, 1981 (R19-25 to 26; D.Ex. 29-2).

Plaintiff Long pursued parallel state administrative and appellate court proceedings challenging, as unlawfully discriminatory, the State's use of sex-based mortality tables in calculating his optional FRS joint-annuitant benefits which resulted in his receiving a lesser monthly retirement benefit than a comparably situated female (*see* R3-47-1 *et seq.* & R4-74-1 *et seq.*, for the complete record of those state proceedings). Plaintiff Long lost on this issue in state court, the Florida First District Court of Appeal ("1st DCA") holding that, while he could not bring a Title VII action in state court, the State's use of sex-distinct mortality tables in calculating his optional FRS joint-annuitant retirement benefits did not constitute unlawful sex discrimination against him under the equal protection guarantees of the federal and Florida constitutions. *See Long v. Dep't of Administration, Div. of Retirement*, 428 So.2d 688, 692-93 (Fla. 1st DCA 1983).

Plaintiff Haas retired effective March 1, 1981, under FRS joint-annuitant Option III (R19-29 & 30) from Metropolitan Dade County (R19-30). He never filed a charge

of discrimination (R19-30; R5-2662-48 & 49, Exhibits "C" & "D").

Intervening plaintiff Rassler retired effective January 1, 1979, under FRS joint-annuitant Option II from the Hillsborough County School Board (R19-30). Over a year and five months later he filed his initial EEOC charge against the school board on May 15, 1980 (R8-2737-6 & 9), though the State has no record of it (R19-31; D.Ex. 31; *see also* R19-29). Indeed, the first charge of which the State was aware was Rassler's amended charge of August 24, 1981 (R19-31; D.Ex. 31-6). That amended charge named as respondent the State of Florida, Department of Administration, Division of Retirement (D.Ex. 31-6) and was transmitted thereto by the EEOC on October 1, 1981 (D.Ex. 31-3).

Class member Louis Samaha retired on January 29, 1979 (*e.g.*, D.Ex. 30-11 & 12; P.Ex. 27; R8-2740-3), under FRS joint-annuitant Option III effective February 1979 (R19-32) from the Pinellas County School Board (R19-32; P.Ex. 27). Three hundred thirty-two (332) days later he filed his initial EEOC charge of discrimination against the school board on December 27, 1979 (P.Ex. 27; R8-2740-3), though the State has no record of it (R19-31; D.Ex. 30; *see also* R19-29). Indeed, the first charge of which the State was aware was Samaha's amended charge of August 25, 1981 (R19-31; D.Ex. 30-11 & 12). That amended charge named as respondent the State of Florida, Department of Administration, Division of Retirement (D.Ex. 30-11 & 12) and was transmitted thereto by the EEOC by the same October 1, 1981 letter which transmitted plaintiff Rassler's amended charge (D.Ex. 31-3).



## REASONS FOR GRANTING THE WRIT

I. By its decision herein—specifically conflicting with and finding “wrong as a matter of law” the 9th Circuit’s decision in *Probe*<sup>14</sup>—the 11th Circuit has sanctioned the “regime of discretion” which this Court condemned in *Manhart*, *supra* 435 U.S. at 722 n.42.

There is no question that were the FRS in the 9th Circuit where *Probe* controls, there would have been a zero liability finding herein rather than the \$43.6 million affirmed below. See also *Retired Public Employees’ Ass’n of California v. State of California*, 799 F.2d 511 (9th Cir. 1986). Likewise there is no question that were the FRS in the 2d Circuit where *Spirit II*<sup>15</sup> controls, there also would have been a zero liability finding herein. See also *Hannahs v. N.Y. State Teachers’ Retirement System*, No. 78 Civ. 2541-CSH (S.D. N.Y., filed March 9, 1987).

The 11th Circuit is in clear and direct conflict with *Probe*, which addressed a pension plan in all essential respects identical to the one here at issue. The *Probe* plan, just as the FRS, was a state administered and operated defined-benefit pension plan established and administered pursuant to the provisions of state statutes. *Id.* 780 F.2d at 778, 778 nn. 1 & 2, 781. It, just as the FRS, paid the same monthly retirement benefit to similarly situated males and females under its first and primary single-life option. *Id.* at 778, 778 n.1, 782. It, just as the FRS, offered optional

<sup>14</sup>*Probe v. State Teachers’ Retirement System*, 780 F.2d 776 (9th Cir.), cert. denied, — U.S. —, 90 L.Ed.2d 978 (1986) (“*Probe*”).

<sup>15</sup>*Spirit v. Teachers’ Insurance & Annuity Ass’n*, 735 F.2d 23 (2d Cir.), cert. denied, 469 U.S. 881 (1984) (“*Spirit II*”).

joint-annuitant retirement benefits under which, because of the application of sex-distinct mortality tables prior to August 1, 1983, males received less than similarly situated females. *Id.* at 778-79, 782. Also in *Probe*, just as here, the plan was ordered to prospectively equalize the male retirees’ benefits. *Id.* at 779.

However in *Probe*, unlike here, the 9th Circuit held *Norris* foreclosed the award of retroactive relief—foreclosed the prospective equalization of retirement benefits based on contributions made prior to the effective date of *Norris*, 780 F.2d at 782-83; *cf. Id.* at 783-84 (addressing “Equal Pay Act” claims). As said, application of *Probe* to this case would have completely barred the award of relief. And also as said, the 11th Circuit specifically disagreed with and declined to follow *Probe*—finding it “wrong as a matter of law,” 805 F.2d at 1548 (A13-A14).

The 11th Circuit is also in clear and direct conflict with *Spirit II*,<sup>16</sup> because all retirees under the FRS obtain a vested contractual right to the full amount of their retirement benefits, which arises as of the effective date of retirement and which prevents the State from ever subsequently reducing the same, and because there is no question the award in this case would be paid by the employers (the State and its FRS participating governments) or the plan (the FRS). The critical holding of *Spirit II* in this respect, 735 F.2d at 28-29, was presented to both the district court and the 11th Circuit as also foreclosing the award of relief in this case, although neither addressed it.

*Spirit II*, just as *Probe*, also dealt solely with the issue of whether *Norris* foreclosed the award of prospective top-

<sup>16</sup>See n.15 herein, *supra* at p. 14.

ping up of future retire benefits to pre-August 1, 1983 retirees, 735 F.2d at 26, which the 2d Circuit recognized was a limited form of retroactive relief subject to the *Norris* prohibition, *Id.* at 25-26. The 2d Circuit specifically found *Norris* foreclosed "any possibility of the retroactive imposition of added financial burdens upon employers or [pension] plans . . .," *Id.* at 29; accord, *Id.* at 28. This determination was essential to its holding, *Id.* at 28-29, that with respect to a guaranteed 2½% return as to which all the pre-August 1, 1983 retirees accordingly had a vested contractual right, *Norris* prohibited the award of relief—even though the 2d Circuit considered this 2½% "insignificant."<sup>17</sup>

Thus, because FRS retirees have a vested contractual right to the full amount of their retirement benefits, application of *Spirit II* would also have completely barred the award of relief in this case. In short, not only is the 11th Circuit's decision in clear and direct conflict with the 9th Circuit's decision in *Probe*, it is also in clear and direct conflict with the 2d Circuit's decision in *Spirit II*.

Moreover, under the 11th Circuit's decision in this case every pension plan in Florida, Georgia, and Alabama which used sex-distinct mortality tables in the calculation of retirement benefits at any time subsequent to March 24, 1972—even if such plans, just as the FRS, complied with the *Norris* mandate and converted to unisex tables by

<sup>17</sup>The 2d Circuit also held in *Spirit II* that *Norris* did not foreclose the award of relief to pre-August 1, 1983 retirees where vested contractual rights were not involved and where, therefore, the award would not impact the employer or the plan. 735 F.2d at 27-28. However, this aspect of *Spirit II* is inapplicable to the instant case because of the vested contractual rights of FRS retirees.

August 1, 1983—is potentially liable under Title VII to those pre-*Norris* retirees whose benefits were calculated using the sex-distinct tables. Indeed, by the 11th Circuit's application of the "continuing violation theory" to this pension benefit case, 805 F.2d at 1546 (A10), any living retiree, even if he or she retired in the 1950's or 1960's, has a potential Title VII action presently available for at least prospective adjustment of pension benefits if sex-distinct tables were used in the calculation of those benefits.

This is unconscionable, for if Florida, Georgia, and Alabama were in the 9th Circuit such would not be the case—and if they were in the 2d Circuit, such would also not be the case (at least to the extent of vested contractual rights). This also is simply not sanctioned by *Norris*, 463 U.S. 1073 (1983), or *Manhart*, 435 U.S. 702 (1978). Furthermore, when it is remembered that only the 11th, 9th and 2d Circuits have to date addressed the *Norris* non-retroactive issue, the 11th Circuit's decision in this case, if it remains unreviewed and uncorrected, will engender in the remaining circuits "a regime of discretion that produce[s] different results for breaches of duty that cannot be differentiated in policy"<sup>18</sup>—will engender "a regime of discretion" that could be devastating in its impact on pension plans throughout the United States.

It seems clear that in *Norris* this Court, in the exercise of its equitable power, intended to wipe the slate clean as of August 1, 1983, for all pension plans throughout the

<sup>18</sup>*Manhart*, *supra* 435 U.S. at 722 n.42 [quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)].

United States.<sup>19</sup> In other words, benefits attributable to pre-Norris (pre-August 1, 1983) contributions are not actionable under Title VII, even though those benefits were calculated using sex-distinct mortality tables and even though the use of sex-distinct tables in the calculation of retirement benefits is a violation of Title VII. In the instant case only pre-August 1, 1983 retirees are before the Court,<sup>20</sup> and thus all of their benefits are attributable to pre-Norris contributions. They therefore have no redressable Title VII injury.

The 2d and 9th Circuits have in effect said yes, Norris did wipe the slate clean. The 11th Circuit has said no, such is not the case, and its decision must not go unreviewed and uncorrected.

**II.A.** The 11th Circuit affirmed the award of retroactive relief (in the form of prospective adjustment of pension benefits only) to the pre-Manhart portion of the plaintiff class herein.<sup>21</sup> Again the 11th Circuit is in clear and direct conflict with the 9th Circuit—this time with its decision in *Retired Public Employees*.<sup>22</sup>

<sup>19</sup>*Cf. Retired Public Employees' Ass'n of California v. State of California*, supra 799 F.2d at 514 (Manhart and Norris seem "to be clear Supreme Court disapproval of retroactive relief in pension cases").

<sup>20</sup>Because of Florida's compliance with Norris by converting to unisex tables effective August 1, 1983, the post-August 1, 1983 retirees herein (subclass B) are not before the Court. See n.3 herein, supra at p. iv.

<sup>21</sup>See n.10 herein, supra at p. 6.

<sup>22</sup>*Retired Public Employees' Ass'n of California v. State of California*, 799 F.2d 511 (9th Cir. 1986) ("Retired Public Employees"). Note that the State supplied the case to the 11th Circuit as supplemental authority, but nowhere in the 11th Circuit's subsequent decision was the case discussed or even cited.

In *Retired Public Employees*, which also dealt with a state operated and administered defined-benefit pension plan, the 9th Circuit held that in any event Manhart barred the award of retroactive relief (in the form of prospective adjustment of pension benefits) to pre-Manhart retirees. Every distinction noted by the trial and appellate courts in this case as justifying the award of relief to the pre-Manhart retirees herein, was addressed and disposed of in *Retired Public Employees*. Nevertheless, in direct conflict with *Retired Public Employees* the 11th Circuit affirmed the award of relief to the pre-Manhart retirees in this case.

Moreover, since all FRS retirees obtain a vested contractual right to the full amount of their retirement benefits which arises as of date of retirement, there appears to be no question that all nine members of the Norris Court would hold no relief of any sort should have been awarded to the pre-Manhart retirees herein. In this regard careful attention is directed to Justice Marshall's dissent (joined by Brennan, White, and Stevens) on the Norris non-retroactive liability issue, 463 U.S. at 1093-95. Thereat, *Id.* at 1094, Justice Marshall and his three brethren indicated they would not award prospective topping up of pension benefits attributable to contributions collected before the date of Manhart where, as here, retirees have a vested contractual right to the full amount of their retirement benefits.

In this respect, the only difference between the Norris Court members was as to the liability cut-off date. As said, for Justice Marshall and his three brethren it would have been the date of Manhart with persons retiring prior thereto entitled to no relief where, as here, vested contractual rights are involved, *Id.* at 1094-95. For the re-



maining majority the liability cut-off date is the August 1, 1983 effective date of the *Norris* judgment with persons retiring prior thereto entitled to no relief, *Id.* at 1075 (per curiam), 1107 n.12 (Powell, joined by Burger, Blackmun & Rehnquist), 1111 (O'Connor).

In short, it seems clear all nine members of the *Norris* Court would at a minimum hold no relief should have been awarded to the pre-*Manhart* retirees in this case. Thus, not only is the 11th Circuit's affirmance of the award to the pre-*Manhart* retirees herein in direct conflict with the 9th Circuit's *Retired Public Employees* decision, it is also in direct conflict with the clearly stated unanimous position of the *Norris* Court. Accordingly, the 11th Circuit's decision must again not go unreviewed and uncorrected.

**II.B.** Notwithstanding that proration calculations were actually performed in this case (*see* A113-A117; A50-A53) and notwithstanding that all nine members of the *Norris* Court agreed as a matter of law on the concept of proration (with again their only difference being as to the liability cut-off date), the 11th Circuit refused to prorate the relief awarded herein, 805 F.2d at 1551 (A21-A22).

In *Norris* it is clear that, for any person retiring after *Manhart*, Justice Marshall and his three brethren would have only required proration of relief (i.e., topping up to the unisex level of only that portion of the retiree's pension benefits attributable to post-*Manhart* contributions) where, as here, vested contractual rights are involved, *see* 463 U.S. at 1094-95; to quote, *Id.* at 1095:

... [The State] need only ensure that [the female retiree's] monthly benefits are no lower than they would have been had her post-*Manhart* contributions been

treated in the same way as a similarly situated male employee.

The non-retroactive *Norris* majority also agreed on proration, but as of August 1, 1983, rather than the date of *Manhart*. *Id.* at 1107 n.12 & 1111.

Moreover, in the wake of *Norris* commentators with substantial credentials in the pension area have recognized the applicability of proration (at least under an "accrued benefit" methodology) to defined-benefit pension plans such as the FRS. *E.g.*, Hager & Zempleman, *The Norris Decision, Its Implications & Applications*, 32 Drake L. Rev. 913, 936-37 & 938-39 (1983).

In short, the 11th Circuit completely ignored the clearly stated position of every member of the *Norris* Court when it refused to order proration of the relief to the post-*Manhart* portion of the plaintiff class—just as it did when it affirmed the award of relief to the pre-*Manhart* retirees herein.

**II.C.** The issue of perhaps the greatest importance and potentially most devastating national impact in this case is the 11th Circuit's application of the "continuing violation theory" in refusing to limit the scope of the class, 805 F.2d at 1546 (A9-A10) (*see* herein, *supra* at pp. 16-17).

The 11th Circuit did not dispute the State's point that, in order to be included in a Title VII class, a potential class member must have suffered a discriminatory event within the requisite time period before the filing of an appropriate EEOC charge of discrimination by a named representative plaintiff, which in Florida's case is 300 days.<sup>23</sup>

<sup>23</sup>Florida became a recognized EEOC deferral state on September 7, 1978. *See* 43 Fed.Reg. 39775 (1978).

Rather, citing to *Bazemore v. Friday*, 478 U.S. —, 92 L. Ed. 315 (1986) ("*Bazemore*"), it held that any retiree no matter when he retired was in the class so long as he received a monthly benefit check within the requisite 300-day time period.

However, *Bazemore* was a pure salary case—not a pension case. Moreover, nowhere did *Bazemore* even cite *Manhart* or *Norris*, and it most certainly does not undercut their continued vitality in the pension context nor eliminate the fact that both denied retroactive relief. Indeed *Norris*, by its denial of retroactive relief in the form of prospective adjustment of pension benefits, negates application of the continuing violation theory in the pension context—for had the theory applied, prospective adjustment of pre-August 1, 1983 pension benefits could not have been denied.

Additionally *Norris*, by its focus on pension plan funding and benefit calculation, clearly implies that in a Title VII pension benefit case such as this it is the calculation of benefits at date of retirement which is the discriminatory event, for funding as to any individual retiree ends as of date of retirement and it is at such time that mortality tables are applied in benefit calculation and the discriminatory event, if any, occurs—not at any later time. Moreover, in Florida's case every person who is about to retire under the FRS actually receives copies of the calculations of his or her future monthly retirement benefits (see A46, ¶¶40-41; A109, ¶¶40-41). In this regard, see *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (discriminatory event occurs at time employment decision is made and communicated, not at later time when employ-

ment decision takes effect). In short *Bazemore*, being a salary case, is inapposite in the instant pension context.

Furthermore, the position of the 11th Circuit places it in conflict with the 2d Circuit in *Clissuras v. City of New York Teachers' Retirement Board*, an unreported decision recently denied review and rehearing by this Court.<sup>24</sup> In *Clissuras* the 2d Circuit affirmed as untimely a late filed EEOC charge in a pension benefit case, which could not have occurred had it found the continuing violation theory applied. Moreover, a district court in the 2d Circuit has specifically held the continuing violation theory does not apply in a Title VII pension benefit case—that it is the calculation of benefits at date of retirement which is the discriminatory event. See *Hannahs v. N.Y. State Teachers' Retirement System*, 26 F.E.P. Cases 527, 531 (S.D. N.Y. 1981).<sup>25</sup>

If the continuing violation theory does not apply in this pension benefit case, as *Norris* indicates and the 2d Circuit appears to have held, then the scope of the class must be limited to those pre-August 1, 1983 retirees who retired no more than 300 days prior to plaintiff Long's October 7, 1981 EEOC charge (if his claims be found not barred by collateral estoppel or res judicata) or 300 days prior to intervening plaintiff Rassler's amended August

<sup>24</sup>See 55 U.S.L.W. 3310 & 3321 for summary of 2d Circuit's decision (filed March 31, 1986), cert. denied, — U.S. —, 93 L.Ed.2d 357 (Sup.Ct. #86-474, Nov. 3, 1986), reh. denied, — U.S. —, 93 L.Ed.2d 862 (Jan. 12, 1987).

<sup>25</sup>*Hannahs* was cited to the 11th Circuit in the State's brief on this point.

24, 1981 charge (if he be found to have exhausted Title VII administrative remedies).<sup>26</sup> Likewise, under 42 U.S.C. § 2000e-5(g) the relief liability cut-off date can be only two years prior thereto.

Finally, the extreme importance of resolving whether the "continuing violation theory" applies to Title VII pension benefit cases, especially in the wake of *Bazemore*, cannot be overstated—for if the issue remains unresolved, such is the single most crucial thing which will engender the "regime of discretion" of potentially devastating national impact in the remaining circuits that have yet to address *Norris*. The 11th Circuit's decision on this issue *must* not go unreviewed. Indeed for this reason alone, if no other, review should be granted.

III. In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), this Court held 28 U.S.C. § 1738 requires that federal courts in Title VII lawsuits give final state court judgments following from appeals of state administrative proceedings, such as the Florida 1st DCA's judgment adverse to plaintiff Long in the instant case,<sup>27</sup> the same preclusive effect as they would be given by the courts of that state. Subsequently, in *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. —, 84 L.Ed.2d 274 (1985), this Court explicitly held the *Kremer* rule applies even if

<sup>26</sup>Plaintiff Haas is not addressed because he never filed an EEOC charge and thus has no independent Title VII standing. Class member Samaha is not addressed because he is just that—a class member, not a named representative plaintiff. Further, intervening plaintiff Rassler's initial May 15, 1980 EEOC charge is not used because defendants established without rebuttal that it failed to put them on notice.

<sup>27</sup>See *Long v. Dep't of Administration, Div. of Retirement*, 428 So.2d 688 (Fla. 1st DCA 1983) ("Long").

the Federal court lawsuit is brought under a statute over which federal courts have exclusive jurisdiction.

Yet, in flagrant disregard of *Kremer*, *Marrese* and § 1738, the 11th Circuit's decision herein, that neither collateral estoppel nor res judicata bars plaintiff Long's Title VII claims because a Title VII action cannot be brought in Florida courts, 805 F.2d at 1546 (A9), has and will deprive *all* Florida appellate court judgments (as well as, possibly, also those of Georgia and Alabama) of any finality whatsoever in *all* subsequent federal court actions brought under statutes over which the federal courts have exclusive jurisdiction. In other words, the 11th Circuit's decision sets a highly dangerous and erroneous precedent of general applicability that is simply not in accord with the law announced by this Court.

Indeed, because the Florida 1st DCA held the State's use of sex-distinct mortality tables in calculating Plaintiff Long's FRS optional joint-annuitant retirement benefits did not constitute unlawful sex discrimination against him in violation of the equal protection guarantees of the federal and Florida constitutions,<sup>28</sup> at a minimum collateral estoppel would bar his Title VII claims herein, *e.g.*, *Kremer*, *supra* 456 U.S. at 481 n.22. In this regard, the 11th Circuit is again in clear and direct conflict with a decision of the 9th Circuit—this time *Hirst v. State of California*, 770 F.2d 776 (9th Cir. 1985).

In *Hirst* (which was cited to the 11th Circuit in the instant case) the 9th Circuit held collateral estoppel nevertheless barred a Title VII action even though, in recog-

<sup>28</sup>*Long*, *supra* 428 So.2d at 692.



nition that a Title VII action could not be brought in the California courts, it also held *res judicata* did not bar such. Additionally, what is totally unconscionable herein is the panel's completely ignoring controlling 11th Circuit precedent which would have mandated the application of collateral estoppel to bar plaintiff Long's Title VII claims. See *Burney v. Polk Community College*, 728 F.2d 1374 (11th Cir. 1984), which was cited and argued to the panel as controlling on the collateral estoppel issue herein.

*Burney*, as here, dealt with the preclusive effect on federal court Title VII claims of a final Florida appellate court judgment arising from the appeal of state administrative proceedings which, as here, were *not* conducted under Florida's employment discrimination law.<sup>29</sup> Unlike here, the *Burney* court rejected as irrelevant the fact that the administrative proceedings there involved were not conducted under Florida's employment discrimination law, and held collateral estoppel barred the plaintiff's federal court Title VII claims—specifically finding the Florida appellate court judgment was entitled to “full faith and credit” under *Kremer* and § 1738, *Id.* 728 F.2d at 1378-81, and would be accorded preclusive effect in Florida courts, *Id.* at 1381-82. As said, the panel in this case completely ignored *Burney*, neither citing nor discussing it despite its having been argued as controlling.

<sup>29</sup>At the time of *Burney*, see 728 F.2d at 1378 n.10, that law constituted Part IX of Chapter 23, Florida Statutes (1981), §§ 23.161-167. The law was transferred in 1983 and presently constitutes the first part of Chapter 760, Florida Statutes (1985), §§ 760.01-10. It is known as the “Florida Human Rights Act,” Fla.Stat. § 760.01 (1985), and “is patterned on Title VII of the Civil Rights Act of 1964,” *School Bd. of Leon County v. Hargis*, 400 So.2d 103, 108 n.2 (Fla. 1st DCA 1981).

As for *res judicata*, the 11th Circuit's decision is in conflict with the 7th Circuit's decision in *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238, 1240-43 (7th Cir. 1983), which held, in light of a prior final state appellate court judgment, that *res judicata* barred a federal court Title VII action—even though the 7th Circuit accepted for the purposes of argument that a Title VII action could not be brought in the courts of the state concerned, *Id.* at 1241 n.6. See also *Unger v. Consolidated Foods Corp.*, 693 F.2d 703, 705-07 (7th Cir. 1982), *cert. denied*, 464 U.S. 1017 (1983) (collateral estoppel applied to bar Title VII action).

In sum, not only is the 11th Circuit's decision on this point in conflict with decisions of the 7th and 9th Circuits as well as its own earlier precedent, it is also in conflict with this Court's decisions in *Kremer* and *Marrese* by establishing dangerous erroneous precedent that no final state appellate court judgment is entitled to any preclusive effect whatsoever in a federal court action brought under a statute over which federal courts have exclusive jurisdiction. Again the 11th Circuit's decision must not go unreviewed.

IV. Absent plaintiff Long, there is herein no remaining named representative plaintiff who has exhausted Title VII administrative remedies.<sup>30</sup> Plaintiff Haas never filed an EEOC charge, and intervening plaintiff Rassler filed his initial EEOC charge almost a year and a half after his

<sup>30</sup>In recognition of *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392-98 (1982), and controlling 11th Circuit precedent applying *Zipes*, see *Jackson v. Seaboard Coast Line R. Co.*, 678 F.2d 992, 1010 (11th Cir. 1982), defendants affirmatively presented the exhaustion issues in the district court and then the 11th Circuit.

January 1, 1979 date of retirement which, being well beyond the 300-day charge-filing limit, renders his Title VII claims time barred, e.g., *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977)—that is if the continuing violation theory be herein determined inapplicable and the discriminatory event be determined to be the calculation of benefits at date of retirement (see Part II.C. herein, *supra* at pp. 21-24).<sup>31</sup>

In relation to the Title VII class herein, and it is solely a Title VII class, the issue is *not* mootness of the named representatives' claims occurring following the commencement of litigation and certification of the class, as in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 752-57 (1976), and *Sosna v. Iowa*, 419 U.S. 393, 398-403 (1975). Rather the issue is the failure of the remaining named plaintiffs herein to satisfy from the outset, and well prior to the commencement of litigation, the administrative standing requirements of Title VII—the issue is plaintiffs Haas' and Rassler's lack from the outset of any actionable or redressable Title VII injury. In other words, with no remaining named plaintiff herein having satisfied Title VII's administrative standing requirements, none can "show that he is within the [Title VII] class of persons

<sup>31</sup>Indeed, even class member Samaha's Title VII claims are time barred for he, just as plaintiff Rassler, filed his initial EEOC charge more than 300 days after his January 29, 1979 date of retirement. Moreover, as he retired more than 300 days before the July 1982 initial filing of the complaint in this cause, he can in no way take advantage of the tolling of Title VII limitation periods which occurs upon the filing of a Title VII class action complaint, see *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983).

who will be concretely affected," *Vuyanich v. Republic Nat'l Bank of Dallas*, 723 F.2d 1195, 1200 (5th Cir.), *cert. denied*, 469 U.S. 1073 (1984) [quoting *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)].

Indeed, in *Wakeen v. Hoffman House, Inc.*, *supra* 724 F.2d at 1246, the 7th Circuit held that a person who had not exhausted Title VII administrative remedies could not represent a Title VII class where, as should be the case here, the claims of the one representative plaintiff who did exhaust were held barred by *res judicata*.

If there exists no Title VII exhausting named representative plaintiff, then there can be no Title VII class. The 11th Circuit skipped over this issue in jumping directly to the continuing violation theory. However, it is potentially dispositive herein and presents an important question of federal law that has not been, but should be, settled by this Court.<sup>32</sup>

<sup>32</sup>The closest this Court has come is in *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), which held that Title VII provided no justification for opening up class actions. The instant question, in essence, presents the converse—that Title VII's administrative standing requirements limit class actions as the 5th Circuit held in *Vuyanich v. Republic Nat'l Bank of Dallas*, *supra* 723 F.2d at 1198-1201; accord, *Falcon v. General Telephone Co. of the Southwest*, 611 F.Supp. 707, 713-18 (N.D. Tex. 1985), *on remand from*, 457 U.S. 147 (1982).

**CONCLUSION**

Because the 11th Circuit has blithely chosen to go its own way in this case, specifically conflicting with and completely ignoring clearly dispositive contrary precedent from other circuits as well as (in at least one instance) also from itself, because it has decided federal questions in ways which are in conflict with the applicable decisions of this Court, and because it has decided important federal questions that have not been but should be settled by this Court, petitioners respectfully request that certiorari be granted.

Respectfully submitted,

CHARLES T. COLLETTE

Counsel of Record

DOUGLAS A. MANG

BRUCE A. MINNICK

Mang, Rett & Collette, P.A.

Post Office Box 11127

Tallahassee, Florida 32302

(904) 222-7710

AUGUSTUS D. AIKENS, JR.

General Counsel

Florida Department of Administration

435 Carlton Building

Tallahassee, Florida 32399-1550

(904) 488-4747

*Attorneys for Petitioners*

APRIL 1987



# APPENDIX

# APPENDIX

86 1685

No. 86-

Supreme Court, U.S.  
FILED

APR 21 1986

JOSEPH E. SPANNA, JR.  
CLERK

In The  
**Supreme Court of the United States**

October Term, 1986

STATE OF FLORIDA, *et al.*,

*Petitioners,*

v.

HUGHLAN LONG, S. Dewey Haas, and Carl Rassler, individually and on behalf of all retired and present male employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, as well as the surviving joint annuitants of any deceased retired male employees,

*Respondents.*

**APPENDIX  
TO PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

CHARLES T. COLLETTE

Counsel of Record

DOUGLAS A. MANG

BRUCE A. MINNICK

MANG, RETT & COLLETTE, P.A.

Post Office Box 11127

Tallahassee, Florida 32302

(904) 222-7710

AUGUSTUS D. AIKEN, JR.

General Counsel

Florida Department of

Administration

435 Carlton Building

Tallahassee, Florida 32399-1550

(904) 488-4747

*Attorneys for Petitioners*

150PW

# INDEX TO APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Decision and Opinion of the U.S. 11th Circuit Court of Appeals, dated December 19, 1986 (805 F.2d 1542)	A1
Counsel's Notice of Corrections to Opinion, dated December 24, 1986	A23
Decision and Order of 11th Circuit Court of Appeals Denying Panel Rehearing, dated February 19, 1987	A25
Order of 11th Circuit Court of Appeals (1) Denying Stay of Issuance of Mandate Pending Petition for Writ of Certiorari but (2) Granting Stay of Issuance of Mandate for 30 Days (until March 23, 1987), dated February 19, 1987	A27
Order of 11th Circuit Court of Appeals Continuing Stay of Issuance of Mandate (until April 22, 1987), dated March 10, 1987	A30
Order of 11th Circuit Court of Appeals, dated July 7, 1986	A32
Judgment of U.S. District Court for Northern District of Florida, Tallahassee Division, dated and filed May 29, 1986 (Record on Appeal cite: R13-2913-1 to 2)	A33
Order of U.S. District Court for Northern District of Florida, dated and filed May 28, 1986 (Record on Appeal cite: R13-2912-1 to 3)	A35
Order of U.S. District Court for Northern District of Florida, dated March 29, 1986, and filed March 31, 1986 (Record on Appeal cite: R13-2896-1 to 41)	A37
Order of U.S. District Court for Northern District of Florida, dated March 15, 1984, and filed March 16, 1984 (Record on Appeal cite: R7-2713-1 to 15)	A71



INDEX TO APPENDIX TO PETITION  
FOR WRIT OF CERTIORARI—Continued

Order of U.S. District Court for Northern District of Florida, dated April 25, 1984, and filed April 26, 1984 (Record on Appeal cite: R8-2726-1 to 5) .....	A84
Order of U.S. District Court for Northern District of Florida, dated February 28, 1985, and filed March 1, 1985 (Record on Appeal cite: R9-2778-1 to 6) .....	A88
Parties' Pretrial Stipulation, dated and filed February 3, 1986 (Record on Appeal cite: R12-2881A-1 to 53) .....	A93
Florida Statute § 112.66(9) (1985) (first enacted in 1979 by Section 20, Chapter 79-183 Laws of Florida (1979)) .....	A128
Florida Statute § 121.061 (1985) .....	A129
Florida Statute § 121.071 (1985) .....	A131
Florida Statute § 121.091(1) (1985) .....	A135
Florida Statute § 121.091(6) (1985) .....	A137
Sections 2 & 3, Chapter 86-137 Laws of Florida (1986) (subsequently codified in, respectively, <i>Fla.Stat.</i> § 121.052(4) (1986 Supp.) and <i>Fla.Stat.</i> §§ 121.071(2) & (6) (1986 Supp.)) .....	A140

Hughlan LONG and S. Dewey Haas, individually and on behalf of all retired and present employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, and all joint annuitants thereunder, Plaintiffs-Appellees, Cross-Appellants,

v.

The STATE OF FLORIDA, a governmental body, and the Honorable Robert Graham, as Governor of the State of Florida, Defendants-Appellants, Cross-Appellees.

Nos. 86-3282, 86-3410.

United States Court of Appeals,  
Eleventh Circuit.

Dec. 19, 1986.

State employees brought class action under Title VII, alleging that state officials charged with administering state retirement plan had unlawfully calculated their benefits based on sex-distinct mortality tables. The United States District Court for the Northern District of Florida, No. TCA 82-1056-09, William Stafford, Chief Judge, entered summary judgment for employees on liability issue and awarded damages. Appeal was taken. The Court of Appeals, Godbold, Circuit Judge, held that: (1) state committed separate, actionable discriminatory acts each time it issued disparate retirement checks, so that every retiree who received such a check within 300 days of filing of any EEOC charges could join in class litigation; (2) state was put on notice by Supreme Court decision that it could not rely on sex-distinct mortality tables to determine benefits, so that state violated Title VII by continuing to use such tables; (3) employees were entitled to retroactive relief; and (4) employees were entitled to "topping up" of bene-

fits only to level that they would have received under sex-neutral mortality tables.

Affirmed.

1. Judgment 828(3.42)

State employee's Title VII claim was not barred by res judicata or collateral estoppel, though employee had earlier participated in state court action challenging state retirement system's use of sex-distinct mortality tables on equal protection grounds, as employee could not have brought Title VII action in state court. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

2. Federal Civil Procedure 184.25

To participate in class litigation under Title VII, employee must be victim of some discriminatory event that occurred no more than 300 days prior to filing of any of EEOC charges. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Federal Civil Procedure 184.25

State committed "separate, actionable discriminatory act" each time that it paid state employees retirement benefits based on sex-distinct mortality tables; accordingly, each retiree who received retirement benefits within 300 days of filing of any of EEOC charges could participate in retirees' class litigation against state under Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

See publication Words and Phrases for other judicial constructions and definitions.

4. Civil Rights 32(3)

State officials had notice of employees' Title VII claims, though officials were neither named as respondents nor mentioned in employees' EEOC charges, where officials were sued in official capacities as chief executives of affected state agencies and departments administering state's retirement program. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Federal Courts 755

Trial court's finding, that state was put on notice by Supreme Court decision that it could not calculate retirement benefits for its employees based on sex-distinct mortality tables, was question of law subject to review under error of law standard.

6. Civil Rights 9.14

State was put on notice by Supreme Court decision that it could not calculate retirement benefits for its employees based on sex-distinct mortality tables, so that state violated Title VII by continuing to offer pension plans that discriminated against males; declining to follow *Probe v. State Teachers' Retirement System*, 780 F.2d 776 (9th Cir.).

7. Civil Rights 46(11)

District court order, requiring "topping up" of retirement benefits paid to retired state employees under state retirement plan, did not constitute unlawful retroactive relief, where retirement benefits were not directly based on employees' contributions to plan. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

## 8. Federal Courts 858

District court's finding that state did not act in bad faith, in calculating retirement benefits payable to its employees based on sex-distinct mortality tables, was finding of fact subject to clearly erroneous standard of review in retirees' Title VII suit for prospective and retroactive relief. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

## 9. Civil Rights 44(5)

District court's finding that state did not act in bad faith in calculating retirement benefits payable to its employees based on sex-distinct mortality tables was not clearly erroneous, for purpose of deciding whether male employees adversely affected by state's action were entitled to retroactive relief, where state officials charged with administering retirement plan had relied on advice of counsel that use of sex-distinct tables was not prohibited.

## 10. Civil Rights 46(11)

Retired state employees were entitled to retroactive relief to compensate them for reduced retirement benefits they received based on state's improper use of sex-distinct mortality tables, to extent that state Supreme Court decision should have placed state on notice that its use of sex-distinct mortality tables was improper, where state's retirement fund had surplus of over \$200 million and impact on pension funds and innocent third parties, though burdensome, would not be devastating.

## 11. Civil Rights 46(14)

In Title VII action, state employees that received reduced retirement benefits based on state's improper use of

sex-distinct mortality tables were entitled to a "topping up" of benefits only to level that they would have received under sex-neutral tables, and not to level that female retirees received under sex-distinct tables, though female retirees had acquired vested right to benefits and would accordingly be compensated at higher level. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

## 12. Civil Rights 46(14)

Retroactive and prospective relief awarded to retired state employees in Title VII action, arising out of state's improper use of sex-distinct mortality tables to calculate retirement benefits, would not be prorated in accordance with employees' contributions to retirement fund, where retirement benefits were not based on individual contributions to fund.

---

Mang & Stowell, Douglas A. Mang, Charles T. Collette, Gary J. Anton, Augustus Aikens, Jr., General Counsel, Dept. of Admin., Tallahassee, Fla., for defendants-appellants, cross-appellees.

Jerold Feuer, Ruden, Barnett, McClosky, Schuster & Russell, Woodrow M. Melvin, Jr., Cindy Niad-Hannah, Keith Olin, David Popper, Popper and Popper, Miami, Fla., for plaintiffs-appellees, cross-appellants.

David V. Kerna, pro se.

McGuinness & Williams, Robert E. Williams, Douglas S. McDowell, Garen E. Dodge, Washington, D.C., amici curiae.

Appeals from the United States District Court for the Northern District of Florida.



Before GODBOLD and FAY, Circuit Judges, and ATKINS\*, Senior District Judge.

GODBOLD, Circuit Judge:

Plaintiffs brought this class action under Title VII of the Civil Rights Act of 1964 against the Florida Retirement System ("FRS") for sex discrimination in the administration of its pension plans. Plaintiff class consists of two subclasses: subclass A includes retired male employees who retired after March 24, 1972 and before August 1, 1983 and who elected to receive their pension benefits under one of the three joint-annuitant options of the FRS, and subclass B includes males presently employed by the FRS who are vested in the system because of ten years of service but who have not yet retired.

On cross-motions for summary judgment the district court found for plaintiff class because the Supreme Court's decision in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) put the FRS on notice that it could not rely on sex-distinct mortality tables to determine optional benefits, and, therefore, the FRS violated Title VII by offering pension plans that discriminated against males. The district court reserved ruling on damages until it could conduct an evidentiary hearing on the impact of such damages. After a four-day hearing, the district court concluded that all members of subclass A were entitled to prospective "topping up" of

\* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

1. By ordering the topping up of benefits, a court requires the defendant to pay the plaintiffs the difference between the benefits they actually received and the benefits they would have received had the defendant relied on the proper mortality tables.

their monthly retirement benefits to Florida's current unisex level<sup>2</sup> commencing on April 30, 1986,<sup>3</sup> which would cost the state approximately \$32.3 million. The district court further found that all retirees of subclass A who retired after October 1, 1978 were entitled to retroactive topping up from that date to April 30, 1986, which would cost the state approximately \$11.3 million. We affirm.

### I. Factual Background

The FRS has operated a defined benefit pension plan<sup>4</sup> since 1970. The system serves over 1,100 Florida local governments as well as the state, its agencies, and the state university system. Since its inception the FRS has offered four retirement plans: its primary, single-life plan and three joint-annuitant, optional plans. Under Option 1, the primary benefit plan, a retiree receives a percentage of his average high salary for the past five years. This percentage is based on his number of years of service. If a retiree wants his pension benefits to continue through his

2. Under unisex, or sex-neutral, mortality tables annuities are based on the average life expectancies of male and female employees. This results in higher benefits to male employees and lower benefits to female employees than provided under sex-distinct mortality tables. The FRS voluntarily switched to unisex mortality tables for all employees retiring after August 1, 1986.

3. The district court ruled that the date of judgment, for purposes of damages, was April 30, 1986. The parties do not dispute this date as the proper date for setting damages. The actual date of the final judgment and order was May 29, 1986.

4. In a defined benefit pension plan the employer or pension fund guarantees a certain level of benefits to retirees regardless of whether the contributions collected adequately cover the benefits.

spouse's or another beneficiary's life, then he can choose one of the three optional, joint-annuitant plans. Option 2 is a joint and survivorship option payable for a fixed period of ten years. Option 3 is a joint-annuitant option payable for the joint lives of the retiree and his beneficiary. Option 4 is a joint-annuitant option payable to the retiree and his beneficiary for their joint lives but which, upon the death of either, reduces by one third the monthly benefits payable to the remaining life. Fla.Stat.Ann. § 121.091(6) (1982 & Supp.1986). Until August 1, 1983 the FRS based the joint annuities under these options on sex-distinct mortality tables, which resulted in lower monthly benefits to male retirees. For all employees retiring after August 1, 1983, the FRS now bases the joint annuities on sex-neutral mortality tables.

Since the creation of the FRS similarly situated males and females have contributed the same amounts and received the same primary benefits under Option 1. From 1970 to 1975 the FRS was funded by contributions from both employees and employers. Since 1975 the system has been funded exclusively by employer contributions, except for elected state officers. Because the employers are state and local governments and agencies, employer contributions come from public funds. All contributions to the system, except for elected state officers, are based on a percentage of the gross compensation of participating employees. *Id.* § 121.071. Upon retirement an employee's right to a certain level of benefits under the system vests, and the system cannot reduce the retiree's benefits in the future. The FRS also must collect enough contributions to maintain the system "on a sound actuarial basis," which includes funding for current and projected operating ex-

penses and funding to eliminate over time the unfunded accrued actuarial liability. Fla. Const. art. X, § 14. The Florida legislature can increase or reduce the contribution rates as needed for the FRS to fulfill its obligations. See Fla.Stat.Ann. § 121.061.

## II. Preliminary Issues

[1] The FRS raises several issues regarding the class, its claims, and the proper defendants. First, the FRS argues that plaintiff Long's claim against the system must be dismissed because it is barred by collateral estoppel (issue preclusion) or *res judicata* (claim preclusion) based on *Long v. Department of Admin.*, 428 So.2d 688 (Fla.Dist.Ct. App. 1983). This argument is without merit. The *Long* court held that the FRS's use of sex-distinct mortality tables did not violate the equal protection clauses of the federal and Florida constitutions. *Id.* at 643. There is no collateral estoppel because the Florida court did not rule on Long's Title VII claim and Long did not assert a claim under Florida's employment discrimination statute, which is substantially similar to Title VII. *School Bd. of Leon County v. Hargis*, 400 So.2d 103, 108 n. 2 (Fla.Dist.Ct.App. 1981). There is no *res judicata* because Long could not have brought his Title VII action in state court, and the fact that he could have asserted a similar state employment discrimination claim in the original administrative hearing or its subsequent appeal does not bar a later Title VII claim. Cf. *Thomson v. Petherbridge*, 472 So.2d 773, 775 (Fla.Dist.Ct.App.1985); *Puma v. Puma*, 405 So.2d 224, 226 (Fla.Dist.Ct.App.1981), *petition for review denied*, 412 So.2d 469 (Fla.1982).

[2, 3] Second, the FRS asserts that the certified class is improper because neither plaintiff Samaha's EEOC

charge of December 27, 1979 nor plaintiff Rassler's EEOC charge of May 5, 1979 provided the system with adequate notice as required by Title VII. The FRS claims, therefore, that only plaintiff Long's EEOC charge of October 7, 1981, if not barred by collateral estoppel or res judicata, or plaintiff Rassler's amended EEOC charge of August 24, 1981, can be used to establish a cut-off date for class membership, which would include only those employees who retired within 300 days of the EEOC charge. Under Title VII the discriminatory event against each employee must take place within the requisite time frame before such an employee can be included in the class. *Payne v. Travenot Laboratories, Inc.*, 673 F.2d 798, 813 (5th Cir.), cert. denied, 459 U.S. 1038, 103 S.Ct. 451, 74 L.Ed.2d 606 (1982). The discriminatory event here is not the date of retirement for each employee, as the FRS contends; rather, each month's disparate retirement check constitutes a separate actionable discriminatory event and therefore a continuing violation. See *Basemore v. Friday*, — U.S. —, 106 S.Ct. 3000, 3006, 92 L.Ed.2d 315 (1986); *Perez v. Laredo Junior College*, 706 F.2d 731, 733-34 (5th Cir.1983), cert. denied, 464 U.S. 1042, 104 S.Ct. 708, 79 L.Ed.2d 172 (1984). As a result every retiree who received retirement benefits within 300 days of any of the EEOC charges is properly within the class.

[4] Third, the FRS contends that the district court erred in failing to dismiss the individually named defendants, Robert Graham, Gilda Lambert, and Andrew McMullian, III,<sup>5</sup> because they were neither named as respon-

5. Robert Graham is the Governor of Florida; Gilda Lambert is the secretary of the Florida Department of Administration; and Andrew McMullian, III, is the director of the Division of Retirement within the Florida Department of Administration.

dents nor mentioned in any of the plaintiffs' EEOC charges. This argument is also without merit. These defendants were sued in their official capacities only. Although the EEOC charges failed to name these defendants specifically, they had notice of the charges through their official roles as chief executives of the affected state agencies and departments. Fla.Sta.Ann. §§ 20.04(3)(a), .31(1), .31(2)(c) (Supp.1986). The district court did not err in refusing to dismiss these defendants because they were within "the scope of the EEOC investigation which could reasonably grow out of the administrative charge[s]." *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1123 (5th Cir. Unit B 1981); see also *Hamm v. Members of the Bd. of Regents of the State of Florida*, 708 F.2d 647, 650 (11th Cir.1983); *Tillman v. City of Boaz*, 548 F.2d 592, 594 (5th Cir.1977).

### III. Substantive Issues

#### A. Notice

[5] The district court held that the FRS was on notice that it had to base its optional benefits on sex-neutral tables as of the Supreme Court's decision in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). In reaching this conclusion the district court expressly rejected the system's argument that the law was unsettled regarding pension fund responsibilities for optional pension plans until the Supreme Court's decision in *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463



U.S. 1073, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983). We agree.<sup>6</sup>

[6] In *Manhart* the Supreme Court held that it was illegal for an employer to require female employees to pay higher contributions to an employee pension plan than similarly situated males in order to receive the same benefits at retirement, even if these payments were based on actuarially valid mortality tables for males and females which reflect the fact that, as a class, women live longer than men. *Manhart*, 435 U.S. at 708-09, 98 S.Ct. at 1375. The Court reasoned that Title VII focuses on fairness to the individual rather than to classes of individuals. *Id.* at 709, 98 S.Ct. at 1375. Under the plan at issue in *Manhart*, all females had to pay higher contributions to the pension plan, even though individual females might live longer than similarly situated males. Consequently, while these females were working, they "received smaller paychecks because of their sex, but they will receive no compensating advantage when they retire." *Id.* at 708, 98 S.Ct. at 1375.

The Supreme Court carved out a limited exception to its ruling by holding that it would not "be unlawful for an

6. Plaintiff class argues that the district court's finding that the FRS was on notice that it had to base its optional pension plans on sex-neutral mortality tables as of 1978 was a finding of fact subject to the clearly erroneous standard of review. Although the district court considered evidence regarding whether the system administrators actually knew that their optional pension plans violated Title VII, the district court's decision ultimately turned on whether the language of the *Manhart* decision put a reasonable employer on notice that it must convert to sex-neutral mortality tables. Therefore, the district court's finding that the FRS was on notice as of the Supreme Court's 1978 decision in *Manhart* is a question of law subject to review under the error of law standard.

employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." *Id.* at 717-18, 98 S.Ct. at 1379-80.

In *Norris* the Supreme Court reexamined the *Manhart* "open market" exception. In *Norris* the state employer applied sex-neutral mortality tables to its primary, single-life retirement benefits, as required by *Manhart*. The employer also offered an optional deferred compensation plan. After inviting private insurance companies to submit bids outlining the investment opportunities that they might offer state employees, the employer selected several of these companies to participate in its optional plans. Although an employee was free to choose among the different insurance companies, they offered essentially the same retirement plans, one of which resulted in lower monthly retirement benefits to male retirees. The Supreme Court held, in a plurality opinion, that because an employer would have violated Title VII if it had offered the annuity option based on sex-distinct mortality tables itself, it violated Title VII when it offered such an option through insurance companies it had selected. *Id.* 463 U.S. at 1089, 103 S.Ct. at 3501.

Although its optional pension plans were clearly impermissible under *Norris*, the FRS argues that it reasonably relied on the *Manhart* open market exception until the *Norris* decision and offered as options in its pension plans annuities that reflected annuities available on the open market. The system relies primarily on the Ninth Circuit's decision in *Probe v. State Teachers' Retirement System*,

780 F.2d 776, 782-83 (9th Cir.), *cert. denied*, — U.S. —, 106 S.Ct. 2891, 90 L.Ed.2d 978 (1986), which reached this conclusion under similar facts. The district court found that *Probe* was wrong as a matter of law. We agree.

First, although *Manhart* only addressed contributions to a pension plan, its reasoning applies equally to benefits paid out under a pension plan. Second, and most important, the open market exception applies exclusively to third parties, and, therefore, a reasonable employer knew or should have known that its own optional annuity plans based on sex-distinct mortality tables were impermissible under Title VII. The Supreme Court created the open market exception in *Manhart* because "Title VII . . . primarily govern[s] relations between employees and their employer, not between employees and third parties." *Manhart*, 435 U.S. at 718 n. 33, 98 S.Ct. at 1380 n. 33. As Justice O'Connor later explained in *Norris*, whether the Court believed that the insurance industry should use sex-neutral mortality tables was irrelevant; the decision was up to Congress, which had chosen to limit the scope of Title VII to employers and employees. *Norris*, 463 U.S. at 1107, 103 S.Ct. at 3511 (O'Connor, J., concurring). No matter how the FRS describes its optional pension plans, the end result is that the system, as an employer, offered pension plans based on sex-distinct mortality tables, which was expressly prohibited by the Supreme Court in *Manhart*.

#### B. Prospective relief

[7] The district court properly ordered the topping up of benefits for all subclass A retirees as of the date of judgment. The FRS cannot continue to discriminate against plaintiff class. The system argues, however, that the pro-

spective relief ordered here really constitutes retroactive relief and is therefore subject to the restrictions on retroactive awards announced by the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). This argument has no merit in this case.

"When a court directs a change in benefits based on contributions made before the court's order, the court is awarding relief that is fundamentally retroactive in nature." *Norris*, 463 U.S. at 1092, 103 S.Ct. at 3501 (Marshall, J., concurring in part). This result is true because to the extent that a retirement plan represents a return on contributions made during the employee's working years that were intended to fund completely the benefits which that employee would receive in the future, any additional relief would have to come from an outside source. The Supreme Court struggled with this issue in *Norris* and ultimately concluded that topping up of retirees' benefits as of the date of judgment was impermissible where the court had already determined that retroactive relief was inappropriate. *Id.* at 1105-07, 103 S.Ct. at 3510-11 (Powell, J., dissenting in part and concurring in part); *id.* at 1111, 103 S.Ct. at 3513 (O'Connor, J., concurring).

The Second Circuit considered this problem in *Spirt v. Teacher's Ins. & Annuity Assoc.*, 735 F.2d 23 (2d Cir.), *cert. denied*, 469 U.S. 881, 105 S.Ct. 247, 83 L.Ed.2d 185 (1984). The Second Circuit recognized that prospective topping up was actually retroactive relief when such an award would affect a portion of benefits attributable to contributions made prior to the date of judgment. *Id.* at 26. The court concluded, however, that such concepts of retroactivity did not apply under the facts before it be-

cause the retirement plan in question did not guarantee certain benefits upon retirement. Thus, the court reasoned, the benefits were not based on the amount of contributions made on behalf of each employee, and any topping up would not constitute retroactive relief. *Id.* at 26-27.

This same reasoning applies to the FRS plans. Almost all contributions made to the system since 1975 were made by employers using public funds. Such contributions were not made on behalf of individual employees. Rather the legislature set the employer contribution rates to cover current and future operating expenses and funding for the system's unfunded accrued actuarial liability. Consequently the benefits paid out of the fund were not directly based on the contributions paid into the fund. The district court's order to top up benefits for all subclass A retirees as of the date of judgment therefore constitutes prospective relief and is clearly permissible.

### C. Retroactive relief

The district court awarded retroactive benefits to all subclass A retirees who retired after October 1, 1978.<sup>7</sup> The district court declined to award retroactive benefits to subclass A retirees who retired prior to October 1, 1978. We agree.

7. Although the Supreme Court decided *Manhart* on May 1, 1978, the district court ruled that the FRS was liable to plaintiff class for retroactive damages only as of October 1, 1978. The district court explained that a pension plan needed a reasonable amount of time within which to change the plan and comply with the new *Manhart* rule. Neither party challenges this date as the date by which a pension fund must comply with *Manhart*.

The Supreme Court has said that in a Title VII case, "given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975). The Supreme Court refused to award retroactive damages in both *Manhart* and *Norris*. The Court relied on the equitable considerations announced by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971): (1) whether the decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) "whether retrospective operation will further or retard [the statute's] operation"; and (3) whether the decision would "produce substantial inequitable results if applied retroactively." *Id.* at 106-07, 92 S.Ct. at 355 (citations omitted); see also *Norris*, 463 U.S. at 1106-07, 103 S.Ct. 3510-11 (Powell, J., dissenting in part and concurring in part); *id.* at 1109-10 (O'Connor, J., concurring); *Manhart*, 435 U.S. at 720-21, 98 S.Ct. at 1381-82.

In *Manhart* the Supreme Court recognized that "pension administrators could reasonably have thought it unfair—or even illegal—to make male employees shoulder more than their 'actuarial share' of the pension burden." *Manhart*, 435 U.S. at 720, 98 S.Ct. at 1381. Administrators had no reason to expect that the Court would prohibit pension funds from relying on actuarially sound sex-distinct mortality tables and did not need the threat of a



backpay award to cause them to amend their practices to conform to the new rule. *Id.* at 721, 98 S.Ct. at 1382. Furthermore, the award of retroactive damages would have a potentially devastating effect on the insurance and pension industry, most of whom offered annuities based on sex-distinct mortality tables. *Id.* The Court, therefore, refused to award the plaintiffs retroactive relief.

In *Norris* the Supreme Court similarly refused to award retroactive relief. Justice Powell explained that employers could reasonably have relied on the *Manhart* open market exception to offer annuities in its pension fund like those offered by insurance companies on the open market. *Norris*, 463 U.S. at 1106, 103 S.Ct. at 3510 (Powell, J., dissenting in part and concurring in part). Moreover, "holding employers liable retroactively would have devastating results." *Id.* Justice O'Connor agreed that the decision should only be applied prospectively. She recognized that the employer's reliance on the open market exception was reasonable. She further noted that a retroactive award would not further the operation of Title VII and would likely impose inequitable results. *Id.* at 1109-10, 103 S.Ct. at 3512 (O'Connor, J., concurring).

Before applying the equitable considerations to the facts here, we must consider whether the FRS acted in bad faith. In *Albemarle*, the Supreme Court held that equity does not come into play where the employer acted in bad faith. *Albemarle*, 422 U.S. at 422-23, 95 S.Ct. at 2373-74. An employer acts in bad faith "by maintaining a practice which he knew to be illegal or of highly questionable legality." *Id.* at 422, 95 S.Ct. at 2373. Plaintiff class argues that because the district court found that *Manhart* provided adequate notice and the system had actual notice

from internal memoranda and discussions, a finding of bad faith is compelled as a matter of law, and an award of back benefits is required.

[8, 9] Even though the district court's finding of lack of bad faith may constitute an ultimate fact, it is not a conclusion of law, and the district court's finding is subject to the clearly erroneous standard of review. See *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982); *Matthews v. United States*, 713 F.2d 677, 681 (11th Cir.1983). Given the district court's findings that the FRS administrators reasonably relied on the advice of David Kerns, general counsel for the Florida Department of Administration, and Nevin Smith, then secretary of the Department of Administration, that *Manhart* did not affect their optional annuity plans, a finding of lack of bad faith is not clearly erroneous. Cf. *International Food & Beverage Systems v. Fort Lauderdale*, 794 F.2d 1520, 1526 (11th Cir.1986) ("[B]ad faith . . . is not lightly imputed to public officials: proof of bad faith must be 'irrefragible' i.e. pretty strong and assimilated with a specific intent to inflict injury.").

[10] Applying the equitable consideration here, the district court properly concluded that the FRS was liable for benefits not paid to subclass A retirees as of October 1, 1978. First, the system knew or should have known since the Supreme Court's decision in *Manhart* that any benefits based on sex-distinct mortality tables was impermissible under Title VII. Second, the award of retroactive relief would not "retard the operation" or "frustrate the purpose" of Title VII. The system's argument that retroactive relief is not needed to encourage it and other employers to follow this "new" interpretation of Title VII

is unpersuasive. Third, although the impact on pension funds and innocent third parties may be burdensome, it will not be devastating.

The district court found that the Florida legislature increased the system's contribution rates in 1984, creating a surplus in the fund of over \$200 million. This finding of fact, based primarily on the testimony of the FRS consulting actuary, is supported by sufficient evidence and is not clearly erroneous. As a result the impact on Florida taxpayers is not great. The district court's refusal to consider evidence of the impact on pension funds on the national level was also not in error. *Manhart* put all pension funds on notice that benefits could not be based on sex-distinct mortality tables; all funds, like the FRS, were forewarned and should have converted to sex-neutral mortality tables at that time. The impact on those pension funds that failed to follow the law after *Manhart* should not be considered here.

For these reasons the district court's order topping up benefits with interest from October 1, 1978 to the date of judgment for all subclass A retirees who retired after October 1, 1978 is correct. The same reasoning, however, does not apply to subclass A retirees who retired before October 1, 1978. The *Manhart* decision put all pension plans on notice that they could no longer offer pension plans based on sex-distinct mortality tables. The *Manhart* court, however, refused to apply its ruling retroactively to employees who retired prior to the date of judgment because a pension fund was not on notice then that such laws violated Title VII. It would be inconsistent now to apply this court's ruling retroactively to employees who were not affected by the *Manhart* decision itself.

#### *D. Topping up under the unisex method*

[11] The district court properly ordered the retroactive and prospective topping up of benefits under the unisex method of calculation. Under this method male benefits are raised to that level which males would have received had sex-neutral mortality tables been applied to their original benefits. Plaintiff class argues that if this method of topping up is adopted, members of subclass A will continue to receive smaller pension benefits than equally situated females who retired prior to August 1, 1983. This is true because these female retirees have a vested right to the same level of benefits they received under the sex-distinct mortality tables, which are higher than the benefits they would have received under the unisex method. Plaintiff class argues, therefore, that only by topping up benefits for male retirees and their female beneficiaries to the level of benefits for females who retired prior to August 1, 1983 can the court make the parties equal.

Plaintiff class misconstrues the purpose of Title VII. Title VII does not require equalization; it only requires that plaintiffs be made whole. "The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Albemarle*, 422 U.S. at 418-19, 95 S.Ct. at 2372 (quoting *Wicker v. Hoppsek*, 73 U.S. (6 Wall.) 94, 99, 18 L.Ed. 752 (1867)). The district court, therefore, was correct in ordering relief under the unisex method of calculation.

#### *E. Proration*

[12] The district court properly refused to prorate its awards of retroactive and prospective relief. The FRS

contends that if any relief is granted it should be prorated to the percentage of the benefits not based on previous contributions by or on behalf of the individual employees. Although the district court considered testimony by the system's consulting actuary regarding the mechanics of proration, the district court refused to prorate the award. As mentioned above, benefits in the FRS are not based on individual contributions for individual employees. Instead the legislature sets a contribution rate for the employer based on the pension plan's financial needs. The Florida legislature has the power and responsibility to increase the contribution rates periodically to cover operating costs and the unfunded accrued actuarial liability. Therefore, benefits are not based on contributions previously made into the system and proration is inappropriate.

#### IV. Conclusion

The FRS was on notice as of the Supreme Court's decision in *Manhart* that it had to base its optional pension benefits on sex-neutral mortality tables. The district court, therefore, properly ordered the topping up of all subclass A retirees' benefits to the level they would have received had the FRS relied on sex-neutral tables. The district court's further award of retroactive topping up to all subclass A retirees who retired after October 1, 1978 is also correct.

AFFIRMED.

---

MANG, RETT & COLLETTE, P.A.  
ATTORNEYS AT LAW  
Suite 740 Barnett Bank Building  
Post Office Box 1019  
TALLAHASSEE, Florida 32302  
(904)222-7710

Charles T. Collette  
Douglas A. Mang  
Bruce A. Minnick  
Donald A. Rett

1339 E. Tennessee Street  
Tallahassee, Florida 32308  
(904)878-0700  
Reply to:  
POB 1019

December 24, 1986

Miguel J. Cortez, Clerk  
U.S. 11th Circuit Court of Appeals  
50 Spring Street, S.W.  
Atlanta, Georgia 30303-3147

Re: Notice of Corrections to Slip Opinion in *Long v. State of Florida*, App. Nos. 86-3282 & 86-3410

Dear Mr. Cortez:

In the Court's opinion issued December 19, 1986, there are two errors, corrections of which are hereby noticed. The first is in the last sentence of footnote 1 on p. 950 of the opinion which presently reads (error underlined):

The FRS voluntarily switched to unisex tables for all employees retiring after August 1, 1986.

The sentence correctly should read (correction underlined):

The FRS voluntarily switched unisex tables for all employees retiring on or after August 1, 1983.



The second is in the last sentence at the bottom of the left hand column on p. 951 of the opinion which presently reads (error underlined):

For all employees retiring after August 1, 1983, the FRS now bases the joint annuities on sex-neutral mortality tables.

The sentence correctly should read (correction underlined):

For all employees retiring on or after August 1, 1983, the FRS now bases the joint annuities on sex-neutral mortality tables.

Thank you for your attention to this matter.

Very truly yours,

/s/ Charles T. Collette  
Attorney for Appellants/  
Cross-Appellees

CTC:ter

cc: To All Counsel of Record

---

Hughlan LONG and S. Dewey Haas, individually and on Behalf of all retired and present employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, and all joint annuitants thereunder, Plaintiffs-Appellees, Cross-Appellants,

v.

The STATE OF FLORIDA, a governmental body, and the Honorable Robert Graham, as Governor of the State of Florida, Defendants-Appellants, Cross-Appellees.

Nos. 86-3282, 86-3410

United States Court of Appeals,  
Eleventh Circuit.

Feb. 19, 1987.

Appeals from the United States District Court for the Northern District of Florida; William Stafford, Judge.

Before GODBOLD and FAY, Circuit Judges, and ATKINS\*, Senior Circuit Judge.

# ON PETITION FOR REHEARING

(Opinion Dec. 19, 1986, 11 Cir., 805 F.2d 1542)

## PER CURIAM:

On the issue of bad faith, the petition for rehearing correctly notes that the district court did not find that the Florida Retirement System advisors "reasonably relied" on the advice of the general counsel, and the secretary of the Florida Department of Administration. Pp. 1549-50. This does not change our conclusion that the district court

---

\* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.



did not err in finding defendants were not guilty of bad faith and does not compel this court to find bad faith as a matter of law. The district court did find that the defendants' policy was "a product of poor judgment" but that "[n]one of the principals involved in the decision-making harbored any evil intent or design." Rather they refused to act based on a "misplaced assumption that there would be no retroactive damage award". These subsidiary findings do not require a conclusion of bad faith.

The petition for rehearing is DENIED.

---

UNITED STATES COURT OF APPEALS  
Eleventh Circuit  
50 Spring Street, S.W.  
Atlanta, Georgia 30303-3147

Miguel J. Cortez  
Clerk

In Replying Give Number  
Of Case And Names Of Parties

February 19, 1987

Messrs. Douglas A. Mang  
Charles T. Collette  
P.O. Box 1019  
Tallahassee, FL 32302

No. 86-3282 Long, et al. v. The State of Florida, et al.  
and 85-3410.

MANDATE STAYED TO AND INCLUDING  
March 23, 1987.

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Rule 19.1 of the Supreme Court, effective June 30, 1980, states that a request to certify the record prior to action by the Supreme Court on the petition for certiorari should not be made as a matter of course but only when the record is deemed essential to a proper understanding of

the case by that Court. However, this Court will not transmit the record to the Supreme Court until that court requests to review it.

A copy of the opinion, judgment, or Rule 25 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

MIGUEL J. CORTEZ, CLERK

By /s/ Linda Pritt  
Deputy Clerk

cc: Mr. David Popper  
Messrs. Woodrow M. Melvin, Jr.  
Keith Olin  
and Ms. Cindy Niad-Hannah  
Mr. David V. Kerns  
Messrs. Robert E. Williams  
Douglas S. McDowell  
Garen E. Dodge

MDT-2  
(Rev. 10/84)

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

NO. 86-3282 & 86-3410

HUGHLAN LONG and S. DEWEY HAAS, etc, et al.,  
Plaintiffs-Appellees, Cross-Appellants,  
versus

THE STATE OF FLORIDA, a governmental body,  
and the Honorable ROBERT GRAHAM, as Governor  
of the State of Florida,

Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court for the  
Northern District of Florida

(Filed February 19, 1978)

ORDER:

- ( ) The motion of *Defendants-Appellants, Cross-Appellees* for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.
- (✓) The motion of *Defendants-Appellants, Cross-Appellees* for [X] stay [ ] recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including 30 days from this order the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.
- ( ) The motion of \_\_\_\_\_ for a further stay of the issuance of the mandate is GRANTED to and including \_\_\_\_\_, under the same conditions as set forth in the preceding paragraph.
- ( ) IT IS ORDERED that the motion of \_\_\_\_\_ for a further stay of the issuance of the mandate is DENIED.

/s/ John C. Godbold  
UNITED STATES CIRCUIT  
JUDGE

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

NO. 86-3282 and 86-3410

HUGHLAN LONG and S. DEWEY HAAS, individually  
and on behalf of all retired and present employees subject  
to the Florida Retirement System established by Chapter  
121, Florida Statutes, and all joint annuitants thereunder,

Plaintiffs-Appellees-  
Cross appellants,

versus

THE STATE OF FLORIDA, a government body, and  
The Honorable ROBERT GRAHAM, as Governor of the  
State of Florida,

Defendants-appellants-  
Cross appellees.

Appeal from the United States District Court for the  
Northern District of Florida

(Filed March 10, 1987)

ORDER:

- ( ) The motion of \_\_\_\_\_  
for [ ] stay [ ] recall and stay of the issuance  
of the mandate pending petition for writ of certiorari  
is DENIED.
- ( ) The motion of \_\_\_\_\_  
for [ ] stay [ ] recall and stay of the issuance  
of the mandate pending petition for writ of certiorari  
is GRANTED to and including \_\_\_\_\_,  
the stay to continue in force until the final disposi-  
tion of the case by the Supreme Court, provided  
that within the period above mentioned there shall  
be filed with the Clerk of this Court the certificate  
of the Clerk of the Supreme Court that the certiorari  
petition has been filed. The Clerk shall issue the

mandate upon the filing of a copy of an order of the  
Supreme Court denying the writ, or upon the expi-  
ration of the stay granted herein, unless the above  
mentioned certificate shall be filed with the Clerk  
of this Court within that time.

- (X) The motion of appellant-cross appellees for a fur-  
ther stay of the issuance of the mandate is GRANT-  
ED to and including April 22, 1987, under the same  
conditions as set forth in the preceding paragraph.
- ( ) IT IS ORDERED that the motion of appellants-  
cross appellees for a further stay of the issuance  
of the mandate is DENIED.

/s/ John C. Godbold  
UNITED STATES CIRCUIT  
JUDGE



IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

No. 86-3282 & 86-3410

HUGHLAN LONG and S. DEWEY HAAS,  
individually and on behalf of all  
retired and present employees subject  
to the Florida Retirement System  
established by Chapter 121, Florida  
Statutes, and all joint annuitants  
thereunder,

Plaintiffs-Appellees,  
Cross-Appellants,

versus

THE STATE OF FLORIDA, a governmental  
body, and the Honorable ROBERT GRAHAM,  
as Governor of the State of Florida,

Defendants-Appellants,  
Cross-Appellees.

Appeal from the United States District Court for the  
Northern District of Florida

(Filed July 7, 1986)

Before GODBOLD, Chief Judge and RONEY and FAY,  
Circuit Judges.

BY THE COURT:

— Appellant's motion for stay of the order of June 13,  
1986 pending appeal is GRANTED.

The Court further, on its own motion, GRANTS the  
consolidation of 86-3282 and 86-3410 and expedites the ap-  
peals.

---

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA

HUGHLAN LONG, et al.

Plaintiffs,

JUDGMENT IN  
A CIVIL CASE

v.

STATE OF FLORIDA, et al.,

CASE NUMBER:  
TCA 82-1056-WS

Defendants.

(Filed May 29, 1986)

- [ ] *Jury Verdict.* This action came before the Court for  
trial by jury. The issues have been tried and the  
jury has rendered its verdict.
- [ X ] *Decision by Court.* This action came to trial or hear-  
ing before the Court. The issues have been tried or  
heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that final judgment  
be and is hereby entered in favor of the plaintiffs and  
against the defendants as follows:

1. The court's prior orders of March 16, 1984, and  
March 31, 1986, are confirmed and incorporated herein as if  
fully set forth.

2. As to the approximately \$32,327,000 of prospective  
relief (see paragraph 1, page 40, of the order filed March  
31, 1986) defendants are mandatorily enjoined and directed  
to determine the specific monthly amount of the award  
owed to each class member per month. Defendants shall  
commence monthly payment of such award in each mem-  
ber's monthly pension check. Payments shall commence  
July 1, 1986, except as to 500 plaintiffs whose files require  
manual processing. Payments to those plaintiffs shall be-

gin October 1, 1986, as provided in the stipulation and joint proposal filed by the parties on May 6, 1986.

3. As to the approximately \$11,249,451 award which is presently due and owing, (see paragraph 2, page 40, of the order filed March 31, 1986) defendants are mandatorily enjoined and directed to determine the specific total amount of the award owed to each class member and to pay such amount in full to each class member by September 1, 1986. Those plaintiffs whose files require manual processing shall receive payment on March 1, 1987.

4. As to the relief for each class member as set forth in paragraph 2 hereof, defendants are directed to pay in full on September 1, 1986, such relief as shall accrue between May 30, 1986 (final judgment date) and July 1, 1986, effective date for commencement of payment as set forth in paragraph 2.

5. The court shall, by separate order, determine the specific amount, time and manner of the payment of attorneys' fees to plaintiffs' legal counsel after notice and hearing. No disbursement of attorneys' fees shall occur without further order of the court.

6. Costs shall be taxed pursuant to further order of the court.

7. The court hereby retains jurisdiction to enter such further orders as necessary or to enforce this judgment.

Dated: May 29, 1986 MARVIN S. WAITS, Clerk

By /s/ Ma'Sue Sweeney  
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

HUGHLAN LONG, et al.,

Plaintiffs, TCA 82-1056-WS

v.

ORDER

STATE OF FLORIDA, et al.,

Defendants.

(Filed  
May 28, 1986)

This cause came on for final hearing on February 3, 4, and 5 and 10, 1986. On March 31, 1986, the court entered a non-final order awarding relief to plaintiffs' class, and directed the parties to file a joint proposal for implementation of that relief. Upon consideration of the stipulation and joint proposal, final judgment shall be and is hereby entered in favor of the plaintiffs and against the defendants as follows:

1. The court's prior orders of March 16, 1984, (document 2713) and March 31, 1986, (document 2896) are confirmed and incorporated herein as if fully set forth.

2. As to the approximately \$32,327,000 of prospective relief<sup>1</sup> (see paragraph 1, page 40, of the order filed March 31, 1986) defendants are mandatorily enjoined and directed to determine the specific monthly amount of the award owed to each class member per month. Defendants

<sup>1</sup> In *Arizona Governing Committee, etc. v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492, 3503 (1983), the Supreme Court noted that "when a court directs a change in benefits based on contributions made before the court's Order, the court is awarding relief that is fundamentally retroactive in nature." Of course, since the FRS is a non-contributory plan, the change in benefits required by this order is not based on prior contributions and so the relief is not fundamentally retroactive in nature.

shall commence monthly payment of such award in each member's monthly pension check. Payments shall commence July 1, 1986, except as to 500 plaintiffs whose files require manual processing. Payments to those plaintiffs shall begin October 1, 1986, as provided in the stipulation and joint proposal filed by the parties on May 2, 1986.

3. As to the approximately \$11,249,451 award which is presently due and owing, (see paragraph 2, page 40, of the order filed March 31, 1986) defendants are mandatorily enjoined and directed to determine the specific total amount of the award owed to each class member and to pay such amount in full to each class member by September 1, 1986. Those plaintiffs whose files require manual processing shall receive payment on March 1, 1987.

4. As to the relief for each class member as set forth in paragraph 2 hereof, defendants are directed to pay in full on September 1, 1986, such relief as shall accrue between the May 30, 1986 (final judgment date) and the July 1, 1986, effective date for commencement of payment as set forth in paragraph 2.

5. The court shall, by separate order, determine the specific amount, time and manner of the payment of attorneys' fees to plaintiffs' legal counsel after notice and hearing. No disbursement of attorneys' fees shall occur without further order of the court.

6. Costs shall be taxed pursuant to further order of the court.

7. The court hereby retains jurisdiction to enter such further orders as necessary or to enforce this judgment.

DONE and ORDERED this 28th day of May, 1986.

/s/ William Stafford  
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

HUGHLAN LONG, et al.,

Plaintiffs,

TCA 82-1056-WS

v.

ORDER

STATE OF FLORIDA, et al., (Filed March 31, 1986)

Defendants.

This cause came on for final hearing on February 3, 4, 5, and 10, 1986. Now having heard the evidence and the argument of counsel and being otherwise fully advised of the premises, the court makes the following findings of fact and conclusions of law. Fed. R. Civ. P. 52.

BACKGROUND

This case is a class action brought by certain members of the Florida Retirement System under Title VII of the Civil Rights Act of 1964. Specifically, plaintiffs claimed that the use of sex-distinct mortality tables in calculating retirement benefits was unlawfully discriminatory. On March 16, 1984, this court granted plaintiffs' motion for summary judgment as to liability, reserving the question of the propriety of a damage award. The court found that the denial of retroactive damages in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983) did not preclude such an award in the case at bar, but that before any retroactive damages could be awarded, the court had to consider the three factors set forth in *City of Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978). The court found that *Norris* did not establish a new principle of law and that retroactive damages would not retard



the operation of Title VII. This February hearing was held to adduce evidence as to the third factor—the impact on the fund.

### FINDINGS OF FACT

The parties stipulated to the following facts, and such facts are hereby adopted by the court:

1. As presently certified, plaintiffs' class consists of two distinct and separate subclasses. Subclass A, as presently defined, consists of all male members of the Florida Retirement System (FRS) who retired before August 1, 1983, and the joint annuitants or beneficiaries of those deceased male members who are presently receiving benefits under options 2, 3, or 4 of the FRS. Subclass A is certified under Federal Rules of Civil Procedure 23(b)(1), (2) & (3). Subclass B consists of currently vested male members of the FRS or males who retired on or after August 1, 1983, under options 2, 3, or 4 of the FRS, and their joint annuitants or beneficiaries, and is certified under Federal Rule of Civil Procedure 23(b)(2).

2. The defendants are the State of Florida, the Honorable Robert Graham as Governor of the State of Florida, Andrew J. McMullian, III, Director of the Division of Retirement of the State of Florida Department of Administration, and Gilda Lambert, present Secretary of the Florida Department of Administration who, by operation of Federal Rule of Civil Procedure 25(d), has been substituted in place and instead of Nevin Smith, the previous Secretary of the Florida Department of Administration and an initially named defendant.

3. Plaintiffs' subclass A, excluding those persons who retired between June 1, 1983, and July 31, 1983, has

been properly noticed pursuant to Federal Rule of Civil Procedure 23(c)(2), and includes all persons noticed who have not opted out.

4. The State of Florida, for the purposes of Title VII, is the "employer" of the members of the plaintiffs' class and is authorized and charged under the Florida Statutes with the duty and responsibility of lawfully administering the FRS. No third party unrelated to the State of Florida is authorized to or does administer the FRS fund.

5. The FRS is a defined benefit plan rather than a defined contribution plan. Under the FRS plan, the vested benefits owed are calculated by computing an average final compensation based upon the average annual compensation for the five highest-paying years of compensation preceding retirement.

6. The State of Florida's use of sex-distinct actuarial tables has resulted in lower monthly benefits to male class members in subclass A than to their similarly situated female counterparts.

7. The State of Florida is contractually precluded from lowering the amount of retirement benefits to an employee once the employee has retired and has received his or her retirement option benefit.

8. For 1983, the actuarial value of the FRS plan assets was 6.511 billion dollars.

9. As of June 30, 1985, assets in the FRS trust fund were 8.213 billion dollars.

10. Dr. E.J. Yelton, Executive Director of the State Board of Administration, testified in deposition in this case

on September 19, 1985, that the FRS fund existing to pay benefits then had a present value of 9 billion dollars.

11. From 1980 forward, the Division of Retirement has calculated the actuarial present value of benefits for all retirees receiving a benefit payment during July of each year. The actuarial present value of benefits for those members entitled to a deferred benefit are summarized as follows:

<u>YEAR</u>	<u>Actuarial Present Value*</u>
1980	\$2,340,300,000.00
1981	\$2,824,974,000.00
1982	\$3,242,009,000.00
1983	\$3,802,323,000.00
1984	\$4,142,611,000.00

12. For 1980 and 1983, the actuarial present value of vested accrued benefits as of the date of the FRS plan valuation are as follows:

<u>Year of Valuation</u>	<u>Actuarial Present Value</u>
1980	
Vested Accrued Benefits	\$5,134,048,000.00
1983	
Vested Accrued Benefits	\$6,382,782,000.00

For 1980 and 1983, the actuarial present value of non-vested accrued benefits as of the date of the FRS plan valuation are as follows:

\* For the years 1980, 1981, and 1982 the rate of interest assumed was  $8\frac{1}{2}\%$ . For the years 1983 and 1984, the rate of interest assumed was  $9\%$ . For all years, the 1971 Group Annuity Mortality Table was assumed; however, for 1983 and 1984, the mortality tables were set back three years.

<u>Year of Valuation</u>	<u>Actuarial Present Value</u>
1980	
Non-vested Accrued Benefits	undetermined
1983	
Non-vested Accrued Benefits	\$1,195,127,000.00

13. The actuarial present value of future payroll of the current FRS membership as of the valuation date indicated below is:

<u>Year of Valuation</u>	<u>Actuarial Present Value</u>
1977	\$19,555,000,000.00
1980	\$34,215,000,000.00
1983	\$65,828,000,000.00

14. For the fiscal year ending on June 30, 1981, the FRS reported an addition to reserves (revenues less expenses and disbursements) of over \$539,086,368.00.

15. For the fiscal year 1982-1983, FRS revenues less expenditures were in excess of \$1,051,122,403.00.

16. For the fiscal year ending June 30, 1984, the FRS experienced a \$950,738,065.00 addition to reserves (total revenues less total expenses and disbursements).

17. For the fiscal year ending on June 30, 1985, FRS expects a \$1,166,639,933.00 addition to reserves (total revenues less total expenditures and disbursements).

18. For the fiscal year 1985-1986, total benefit payouts for FRS obligations are expected to be less than \$700,000,000.00.

19. In the opinion of the FRS consulting actuary the FRS would have been in actuarial balance had the Florida

legislature adopted contribution rates no greater than those suggested by Tillinghast, Nelson & Warren, Inc. on the basis of the July 1, 1983, actuarial review.

20. The Florida legislature adopted contribution rates 24 base (basis) points higher than those suggested by Tillinghast, Nelson & Warren, Inc. on the basis of the July 1, 1983, actuarial review and as published in the Florida Retirement Systems Bulletin, dated September, 1984. An additional base (basis) point was adopted and assigned to retiree costs of living increases.

21. A 0.25% increase in the FRS contribution rate is the equivalent of 25 base (basis) points).

22. Article X, Section 14 of Florida's Constitution requires that the FRS shall not provide any increase in the benefits to the members or beneficiaries of the FRS unless the FRS has made or currently makes provision for the funding of the increase in benefits on a sound actuarial basis.

23. As of April 25, 1978 (the date of the *Manhart* decision) the Department of Administration had the authority to adopt unisex tables and implement their use for all future retirees, if the tables adopted would not have an actuarial impact which would require an increase in the contribution rates.

24. As of April 25, 1978, the Department of Administration had not developed a no-cost method of implementing unisex tables but one was adopted as of August 1, 1983.

25. On August 1, 1983, the State of Florida, Department of Administration, Division of Retirement, adopted unisex tables applicable to those persons retiring on or

after August 1, 1983, without any proration made after April 25, 1978.

26. Over 95% of the joint annuitants in plaintiffs' class for those class members who chose options (3) and (4) are, under Florida law, "spouses" of FRS members who are or were members of plaintiffs' class.

27. Since 1975, contributions to the FRS have been made almost exclusively from public funds. Prior to 1975, contributions to the FRS were made both from public funds and from employee contributions. At all times the contribution rate for similarly situated males and females was equal.

28. The employers participating in the FRS are the state government and political subdivisions of the State of Florida, although not all political subdivisions of the State of Florida participate in the FRS.

29. There are over 1,100 local political subdivisions of the State of Florida participating in the FRS.

30. The Division of Retirement has calculated the rate of return on the FRS Trust Fund investments for the following fiscal years, ending June 30 of each year as follows:

<u>Fiscal Year</u>	<u>Net Yield Rate</u>
1974 - 1975	7.25%
1975 - 1976	8.02%
1976 - 1977	8.19%
1977 - 1978	8.26%
1978 - 1979	8.61%
1979 - 1980	9.09%
1980 - 1981	9.60%
1981 - 1982	10.19%
1982 - 1983	9.68%
1983 - 1984	9.27%
1984 - 1985	9.00%



In calculating the above, the Division of Retirement excluded capital gains and losses; the valuation basis for bonds is the amortized value thereof; the valuation basis for equities is the cost thereof.

The valuation method used by the Division of Retirement is different from the method used by the State Board of Administration.

31. The FRS was created on December 1, 1970, out of the Teacher's Retirement System, the State & County Officer & Employees' Retirement System (SCOERS), and the Highway Patrol Pension Fund. In 1972 the Elected State Officers' Class was created as part of the FRS and the Judicial Retirement System was consolidated into the FRS.

32. In 1975, the FRS became employee-noncontributory for regular and special risk members. Thereafter, from 1975 to present, all contributions to the FRS for regular and special risk members have been made solely by such employees' employers.

33. From its inception in 1970 to present, the FRS has been funded by equal contributions as to similarly situated males and females, i.e., the contributions to the FRS made by or on behalf of males and females earning the same salary were and are identical.

34. The FRS retirement plan has and had four methods or options of benefit payments.

35. From its inception to present, the first and primary single-life method of benefit payment (Option 1) paid and pays similarly situated males and females the same monthly benefit, i.e., males and females of the same age retiring with the same length of service and the same

average final compensation receive and received the same monthly benefit under Option 1.

36. Option 2 is and was a joint and survivorship option payable for the fixed period of ten (10) years. Prior to August 1, 1983, it was calculated using sex-distinct mortality tables which resulted in a lower monthly retirement benefit paid to males than to similarly situated females.

37. Option 3 is and was a joint-annuitant option payable for the joint lives of the retiree and his or her designated beneficiary. Prior to August 1, 1983, it was calculated using sex-distinct mortality tables which resulted in a lower monthly benefit paid to males than to similarly situated females.

38. Option 4 is and was a joint-annuitant option payable to the retiree and his or her designated beneficiary for their joint lives but which, upon the death of either, thereafter reduces by one-third (1/3) the amount of the monthly benefit payable for the remaining life. Prior to August 1, 1983, it was calculated using sex-distinct mortality tables which resulted in a lower monthly benefit paid to males than to similarly situated females.

39. Under the FRS, retirement benefits are payable only to retirees of governmental employers participating in the FRS who have reached a designated age and who have worked for at least ten (10) years for an employer participating in the FRS; that is, ten (10) years of service with an FRS participating employer are required before an employee's right vests to receive retirement benefits from the FRS. With respect to the Elected State Officers Class (ESOC) only, vesting occurs in eight (8) years.

40. Historically and presently the FRS is advised prior to retirement that an employee who has vested rights to receive retirement benefits from the FRS plans to retire. The FRS calculates the retirement benefits which that employee would receive under each of the FRS's four options of benefit payment and supplies such information to the employee. The employee then elects the retirement option under which he or she wishes to receive retirement benefits, and the FRS then calculates that employee's retirement benefit under the option selected as of the employee's effective date of retirement. This final calculation of the retired employee's monthly retirement under his or her selected option is likewise supplied to the retired employee. Thereafter, the employee receives monthly retirement benefits under the option selected as calculated by the FRS with respect to the employee's effective date of retirement.

41. The monthly benefit, described in paragraph 40 above, may thereafter be and is increased by such things as costs of living adjustments or Acts of the Florida Legislature, but may not be and is never subsequently reduced.

42. Employer contributions to the FRS and the contribution rates for the designated classes within the FRS are summarized as follows:

Fiscal Year	Employer Contributions	Regular	Special Risk	Selected State Officers
7/75-6/76	\$312,000,000	9%	13%	8%
7/76-6/77	\$367,000,000	9%	13%	8%
7/77-6/78	\$377,000,000	9%	13%	12%
7/78-6/79	\$407,000,000	9.0/9.1%	13.00/13.95%	12.00/16.78%
7/79-6/80	\$449,000,000	9.1%	13.95%	16.78/20.78%
7/80-6/81	\$505,000,000	9.1%	13.95%	20.78%
7/81-6/82	\$639,000,000	9.10/10.93%	13.95/13.91%	20.78%
7/82-6/83	\$718,000,000	10.93%	13.91%	20.78%
7/83-6/84	\$790,000,000	10.93%	13.91%	20.78%
7/84-6/85	\$893,000,000	10.93/12.24%	13.91/14.67%	20.78%

NOTE: Where two rates are indicated, i.e., 10.93/12.24, the first rate, 10.93, applies to the first three months of the fiscal year and the second rate, 12.24, applies to the remaining nine months of the fiscal year.

43. Damage estimates for class members retiring after March 24, 1972, are as follows:

*A. Double Sex Change*

Applying the tables in use by the FRS prior to August 1, 1983, and changing the gender in those tables of both the member and his joint annuitant, the liability to the FRS Trust Fund is estimated as follows:

AS OF JULY 1, 1985:

Payments with interest from May, 1, 1978	\$ 68,300,000.00
Present value of future payments to class members	113,199,000.00
<b>TOTAL:</b>	<b>\$181,499,000.00</b>

AS OF JULY 1, 1986:

Payments with interest from May 1, 1978	\$ 86,669,000.00
Present value of future payments to class members	113,894,000.00
<b>TOTAL</b>	<b>\$200,563,000.00</b>

*B. Single Sex Change*

Applying the tables in use prior to August 1, 1983, and assuming a change in the gender from those tables for the



## A48

class member only, the liabilities to the FRS Trust Fund are estimated as follows:

## AS OF JULY 1, 1985:

Payments with interest from May 1, 1978	\$ 47,640,000.00
Present value of future payments to class members	78,132,000.00
TOTAL	\$125,772,000.00

## AS OF JULY 1, 1986:

Payments with interest from May 1, 1978	\$ 60,518,000.00
Present value of future payments to class members	78,751,000.00
TOTAL	\$139,269,000.00

C. *Unisex Method*

Applying the unisex tables adopted on August 1, 1983, to this class, the liabilities to the FRS Trust Fund are estimated as follows:

## AS OF JULY 1, 1985:

Payments with interest from May 1, 1978	\$ 19,846,000.00
Present value of future payments to class members	32,108,000.00
TOTAL	\$ 51,954,000.00

## AS OF JULY 1, 1986:

Payments with interest from May 1, 1978	\$ 25,182,000.00
Present value of future payments to class members	32,265,000.00
TOTAL	\$ 57,447,000.00

44. Damage estimates for class members retiring after April 25, 1978 (May 1, 1978 payroll entries) are as follows:

A. *Double Sex Change*

Applying the tables in use prior to August 1, 1983, by the FRS and changing both the gender of the member and his joint annuitant, the liabilities accruing to the FRS Trust Fund are estimated as follows:

## A49

## AS OF JULY 1, 1985:

Payments with interest from May 1, 1978	\$ 33,624,000.00
Present value of future payments to class members	79,159,000.00
TOTAL	\$112,783,000.00

## AS OF JULY 1, 1986:

Payments with interest from May 1, 1978	\$ 44,375,000.00
Present value of future payments to class members	79,821,000.00
TOTAL	\$124,196,000.00

B. *Single Sex Change*

Applying the pre-August, 1983 annuity tables to members of this class and assuming the member to be female rather than male, without changing the gender of the member's joint annuitant, the total additional liabilities accruing to the FRS Trust Fund are estimated as follows:

## AS OF JULY 1, 1985:

Payments with interest from May 1, 1978	\$ 23,660,000.00
Present value of future payments to class members	55,132,000.00
TOTAL	\$ 78,792,000.00

## AS OF JULY 1, 1986:

Payments with interest from May 1, 1978	\$ 31,238,000.00
Present value of future payments to class members	55,540,000.00
TOTAL	\$ 86,770,000.00

C. *Unisex Method*

Applying the unisex tables adopted on August 1, 1983, to this class, the liabilities to the FRS Trust Fund are estimated as follows:

## AS OF JULY 1, 1985:

Payments with interest from May 1, 1978	\$ 9,698,000.00
Present value of future payments to class members	22,354,000.00
TOTAL	\$ 32,052,000.00

## AS OF JULY 1, 1986:

Payments with interest from May 1, 1978	\$ 12,800,000.00
Present value of future payments to class members	22,510,000.00
TOTAL	\$ 35,310,000.00



45. Proration is a commonly used and accepted technique used by actuaries as well as others. Defendants suggest that several methods of proration could be applied in this case to allocate a total impact value before and after any date certain. The proration techniques give rise to mathematical formulas which are commonly used or commonly accepted, and yield results consistent with the method employed. The following results are arithmetically consistent with the methods of proration used.

A. For what the defendants have labeled "accrued benefit proration" the following allocation formula is applicable:

Pre-5/78 Portion:

Accrued Benefit at Retirement

Post-5/78 Portion:

(Accrued Benefit at Retirement

—Accrued Benefit at 5/78

Accrued Benefit at Retirement

B. For what the defendants have labeled "contribution proration," the following allocation formula is applicable:

Pre-5/78 Portion:

1—Post 5/78 Portion

Post-5/78 Portion:

Contributions Made from 5/78 to Date

of Retirement Accumulated at

Valuation Rate of Interest

Account Balance or Reserve at Retirement

C. The above allocation formulas were applied individually to each participant.

The following proration values were obtained using the above formulas:

### 1. ACCRUED BENEFIT PRORATION

For May, 1978, Entry Date and July 1, 1985, Damages Date. No calculations were performed for the 1972 Entry Date Class.

	(Unprorated)	Prorated
a. <u>Unisex</u>		
Payments with Interest from May 1, 1978	\$ 9,777,247.00	\$ 2,034,099.00
Present Value of Future Payments	22,402,994.00	5,901,497.00
TOTAL	\$32,180,241.00	\$ 7,935,596.00
b. <u>Single Sex Change</u>		
Payments with Interest from May 1, 1978	\$23,856,628.00	\$ 4,940,564.00
Present Value of Future Payments	55,247,864.00	14,522,627.00
TOTAL	\$79,104,492.00	\$19,463,191.00
c. <u>Double Sex Change</u>		
Payments with Interest from May 1, 1978	\$33,908,236.00	\$ 6,950,515.00
Present Value of Future Payments	79,237,338.00	20,667,571.00
TOTAL	\$113,145,574.00	\$27,618,086.00

### 2. CONTRIBUTION PRORATION

For May, 1978, Entry Date and July 1, 1985, Damages

Date

	(Unprorated)	Prorated
a. <u>Unisex</u>		
Payments with Interest from May 1, 1978	\$ 9,777,247.00	\$ 570,351.00
Present Value of Future Payments	22,402,994.00	1,716,767.00
TOTAL	\$32,180,241.00	\$ 2,287,118.00
b. <u>Single Sex Change</u>		
Payments with Interest from May 1, 1978	\$23,856,628.00	\$ 1,387,979.00
Present Value of Future Payments	55,247,864.00	4,217,828.00
TOTAL	\$79,104,492.00	\$ 5,605,807.00
c. <u>Double Sex Change</u>		
Payments with Interest from May 1, 1978	\$33,908,236.00	\$ 1,929,160.00
Present Value of Future Payments	79,237,338.00	5,958,429.00
TOTAL	\$113,145,574.00	\$ 7,887,589.00

With respect to proration of accrued benefits the following information was obtained via computer tape from the Division of Retirement:

- Average final compensation at retirement
- Service credit at retirement
- Average final compensation at 5/78
- Salary earned by month from 5/78 to date of retirement

The following calculations were performed by Tillinghast:

- Accrued benefit at retirement was determined by multiplying average final compensation at retirement by service percentage at retirement.
- Service percentage from 5/78 to date of retirement was determined by converting the earning for each month into applicable service credit (if sufficient earnings were accrued a month of service credit at the applicable percentage was recognized).
- Service percentage at 5/78 was determined by subtracting from service percentage earned from 5/78 to retirement.
- Accrued benefit at 5/78 was determined by multiplying average final compensation at 5/78 by service percentage at 5/78.

With regard to proration contributions, the following items were input taken from the Division of Retirement data tapes:

- Account balance or reserve at date of retirement
- Earnings by month for the period 5/78 to date of retirement

The following calculations were performed by Tillinghast:

- Contributions made from 5/78 to date of retirement were determined by multiplying the applicable system rate by the earnings for each month and accumulated at the applicable valuation interest rate for that period. (7% from 78-80, 8½% from 80-83)

From these above described calculations, the proration allocation formulas, as previously described, were then performed, and the results of these individual calculations are summarized in the six output listings previously labeled.

44. The actuarial equivalency tables adopted by the FRS effective August 1, 1983, do produce an equal monthly benefit for identically situated males and females retiring on or after August 1, 1983.

As to the disputed facts and facts further adduced at trial, the court makes the following findings:

1. Nevin G. Smith was Assistant Secretary and then Secretary of the Department of Administration. Although Mr. Smith was aware of the *Manhart* decision, he did not believe that *Manhart* compelled a change in the FRS. His belief was based on the oral advice he received from the department's general counsel, David Kerns. Smith felt the sex-neutral primary benefit (Option 1) took the FRS out of the ambit of *Manhart's* holding.

DOA could only make changes in FRS if the changes did not cost the state money. The secretary did not want to take the only available no-cost approach, that is, reducing the benefit payable to women.

The secretary was unaware of the concerns of Lawrence Gibney in 1978 but knew that the division was concerned about *Manhart* in 1979. The secretary admitted that he knew about the complaint of Carl Rassler because he responded to a letter from Representative John Grant to McMullian.

2. David Kerns was general counsel for the Department of Administration. It was his opinion that *Manhart* was not directly applicable to the FRS. Kerns distinguished *Manhart* on three grounds: *Manhart* involved the pay-in stage; it involved a mandatory primary benefit; and it discriminated against women. Defendant's Exhibit 15.

Mr. Kerns recognized that he faced a conflict of interest in that he was not far from retirement. He requested one of his junior attorneys, Samantha Boge, to prepare a memo on the issue. In this September 1, 1981, memo, Ms. Boge concludes that "the Division would be well advised to convert from sex-distinct actuarial tables to unisex tables as soon as is practical." Defendant's Exhibit 14. Mr. Kerns disagreed with Ms. Boge's conclusion and continued to counsel a wait-and-see approach to the issue. He wanted to wait for further word from the Supreme Court itself but did not imagine that five more years would elapse before the next decision.

3. Andrew J. McMullian is the State Retirement Director of the Division of Retirement. Mr. McMullian was aware of the debate over *Manhart* but was convinced that

*Manhart* did not compel a change and thus felt no change was necessary. McMullian maintained his position of wait-and-see even though he received a memorandum from one of his staff attorneys, Diane Kiesling, who suggested that the FRS adopt unisex tables "as soon as practicable" because of the danger of retroactive awards." Plaintiff's Exhibit 7.

McMullian himself had no power to change the FRS, but he could make recommendations to the Secretary of the DOA. At the September 4, 1981, meeting attended by Smith, Kerns, Augustus Aikens (Division Attorney), Gibney, Grenard and McMullian, a consensus was reached to continue to use the sex-distinct tables for Options 2, 3, and 4.

4. The FRS is composed of three different classes of retirees with 99% being the regular class, plaintiffs in this case. The plan offers four options. Option #1, the primary benefit, is a monthly payment until death and is based and has always been based on unisex tables. Options 2, 3, and 4 were based on sex-distinct, though actuarially sound, tables.

There are over 1100 employer participants in the FRS. Those employers who have the option of joining FRS cannot opt out once they elect to join. There are 105 city employers, 67 counties, 300 special districts, with local school boards making up 45% of the membership. The FRS is funded by contributions from the employers based on the payroll, hence the term "non-contributory." The rate of contribution is set by the Legislature, on recommendation from the DOA. The rate is some percentage of the payroll, computed in "base points" or "basis points." One percent



equals 100 base points. According to McMullian, any change in the contribution rate less than one base point (.01%) is insignificant and may be accomplished without legislative action.

5. Michael J. Tierney is an actuary in the firm of Tillinghast, Nelson & Warren, Inc., which is the actuarial firm responsible by contract to the FRS. One of Mr. Tierney's duties is to give his opinion of FRS's condition. The following facts are adduced from Tierney's testimony as an expert witness and are hereby made the findings of this court:

(a) The FRS fund has several components of which one of the most important is the unfunded accrued actuarial liability (UAAL). The UAAL is the accumulation of all past normal costs minus the funds assets. The UAAL is amortized over 30 years. The contribution rate is determined by adding normal costs and the amortization of the UAAL. The rate is now 12.24. The FRS need not have money on hand for future normal cost because the goal is to have future taxpayers pay for future costs.

(b) "Actuarial balance" means that expected future (projected) benefits are covered by expected future assets.

(c) The value of one basis point is approximately 9 million dollars.

(d) A change in mortality assumptions is much less significant than a change in interest rate assumptions. However, any change in assumptions must be made across-the-board to preserve the integrity of the system.

(e) Although the legislature has increased the contribution rate, the rate has never been decreased.

(f) The 1985 Legislature increased the contribution rate 25 basis points.

6. Dr. James McClave offered expert testimony as to the effect of a damage award on the employer-participants of the FRS. In his opinion, any damage award will cause an adverse impact on the county and school board employer-participants since those entities are already experiencing, or will soon experience, an outstripping of taxable property by expenditures.

7. Dr. E.J. Yelton is the Executive Director of the State Board of Administration who is charged with investing the FRS fund. The SBA values the fund assets at market value while the Division and the actuaries use a method similar to book value. The two methods result in widely varying valuations of the fund's condition. The SBA, however, is not at all charged with keeping the fund actuarially sound. Yelton estimated a monthly cash flow of 83-85 million dollars.

8. Lawrence Gibney is the state retirement actuary. In November 1976, Gibney sent a memorandum to the state retirement director to apprise him of certain trends in the industry. Plaintiffs' Exhibit 20. Gibney noted that because of the "general thrust" taken by the EEOC, there was a "strong possibility" that sex-distinct tables would be impermissible. Gibney likened the trend to that of the 1960's when race-based tables were outlawed, even though such tables made sense actuarially. Gibney prepared this memo as part of his routine duties to reevaluate the mortality tables as they relate to retired lives. The director did not respond.

In May 1978, Gibney again addressed the issue of uni-sex tables and warned his superior that, in light of *Man-*

hart, "it is not a question of 'if' but 'when'" the tables would be adopted. Plaintiffs' Exhibit 21. Again, his superior did not respond.

In August 1978, Gibney wrote Kerns, on orders from the retirement director to keep the general counsel informed. Plaintiffs' Exhibit 22. This memorandum is more equivocal than its predecessors, and Gibney concluded the use of sex-based actuarial tables was appropriate until the issue of using the tables to determine actuarial equivalence was addressed.

In November 1978, four months later, in a memo to the file on *Manhart* and the "court case of Oregon," Gibney stated his opinion that "eventually we will be forced to adopt the so-called 'unisex' table so that both male and female members receive the same benefits regardless of their sex." Plaintiffs' Exhibit 23. Gibney also noted that a unisex table would have no effect on the system itself, although the members would be affected. Gibney recommended the use of the unisex table and suggested that the Legislature should implement the change.

In May 1979, Gibney conducted the survey of other state systems (See, Plaintiffs' Exhibit 24) and reported the results to McMullian in June 1979. Plaintiffs' Exhibit 4. In May 1981, Gibney wrote to McMullian about Hughlan Long's specific complaint. Plaintiffs' Exhibit 25. The text of the memo is as follows:

During our recent discussion of Mr. Long's letter especially with regard to the option factors, it appears to me we should make plans for implementing a "unisex" table by January 1983. We'll need to delay because of outstanding estimates. If we should decide to "bite the bullet" we could inaugurate a "unisex" table beginning September 1981 for estimates.

My reason for suggesting early implementation on our own is to avoid any possible retroactive liability that may arise. As I have mentioned in the past, the "unisex" factors are interpolated values between the present factors, the bases of which is our actual experience. As a result, the male benefit would increase and the female benefit would decrease. If we were forced by a court order to a "unisex" table, it's conceivable we would have to make adjustments back to the date of the *Manhart* Case which occurred in September (sic) 1978. We would have to increase the male benefits but I have my doubts as to whether we would be successful decreasing the female benefits. Hence, there could be a retroactive liability. On the other hand, if unisex factors were used from a certain date forward we would have no problem.

Let's discuss at your convenience.

Nevertheless, at the September 1981 meeting, Gibney agreed with the group's opinion that a wait-and-see policy was proper.

As to impact on the fund of a \$200 million award, Gibney merely opined that an increase in the contribution rate would be necessary and required and that without the increase there would be an "immediate" impact. If the unisex tables had been implemented in 1978, there would have been no increase in the contribution rate. Gibney testified that although he felt in 1976 that a change would be mandated in the future, he did not feel the system was obligated to change. However, there was no consideration that *prohibited* a change.

9. Dr. David Nye, a finance professor, testified as plaintiffs' expert. Dr. Nye presented the arithmetical illustration that the fund could pay a 200 million dollar judgment in 70 days of excess cash, with excess cash defined



as the difference between current income and current liabilities. Dr. Nye also noted that the additional rate of return needed to amortize the UAAL as currently planned but with a 200 million dollar judgment added would be .32 percent. Dr. Nye pointed out that in 1979, 1980, and 1981, the system suffered huge losses due to bond swaps and that the losses were absorbed without impact although they would be covered in the future. Dr. Nye concluded that the cost of the system is sensitive to the actuarial assumptions made and that a small change in the assumptions has the effect of erasing real losses.

Dr. Nye also opined that the double sex change is the only way to equalize benefits. This opinion may be illustrated graphically:

male/female (less than) female/male—status quo

female/female (less than) female/male—single sex change

female/male = female/male—double sex change

Thus, to achieve monetary equality, computations must be made on the basis of a change of gender of both the male member and the female joint annuitant.

Dr. Nye acknowledged that an immediate cash loss of 200 million dollars would cause a loss of future investment income and that future investment income is an assumption made in determining the actuarial balance of the fund. Dr. Nye also concluded that 200 million dollars is within the bounds of fluctuation of the system, but that the loss must be recognized.

10. On rebuttal, McMullian identified the reason for not developing the no-cost unisex approach before 1983. That reason was because the no-cost approach would result

in a benefit reduction of over one-half the membership of the fund, i.e., the women. Those in charge of the fund did not want to take that step unless they had to.

11. On rebuttal, Tierney opined that cash flow was not an accurate way to measure impact on the fund, that "impact" should be interpreted as "actuarial impact." Tierney also stated that the double-sex change is an inappropriate measure of damages because the expected total value for males and females is different, simply so because of life expectancies differences of the sexes.

### CONCLUSIONS OF LAW

Section 703(a)(1) of the Civil Rights Act of 1964, as amended provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.  
... 42 U.S.C. § 2000e-2(a)(1)

Title VII became applicable to state governments on March 24, 1972, the effective date of the Equal Employment Opportunity Act.

In 1973, the plaintiffs in *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978) filed suit to enjoin the actuarially sound practice of requiring larger contributions to pension funds from women than men. In 1978, the Supreme Court of the United States found that such a practice violated Title VII. This court



has already determined that the practice of the FRS of paying a lower benefit to males who elected one of the joint annuitant options also violates Title VII. Order, March 16, 1984 (document 2713). This ruling will not be disturbed. The purpose of the final hearing was to determine what amount of damages, if any, should be awarded to the plaintiff class. Both *Manhart* and *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983) delineate the rules for relief as noted in this court's order of March 16, 1984. The discussion in the March 16, 1984, order is still pertinent today, but calls for updating based on the facts now determined.

After hearing the evidence in this case, there is no longer any doubt at all that the state was on notice at least from the date of *Manhart* that the use of sex-based mortality tables was impermissible. The court will emphasize its finding of March 16, 1984, by saying that the state could not and did not reasonably assume that it could continue to use the sex-based tables. Order at p.14, document 2713.

The state simply did not want to make the politically unpopular decision to reduce the females' benefits. The state chose instead to maintain the discriminatory status quo. The irony of that decision is that the status quo helped rather than hurt women. By contrast, in a hypothetical case, if the state justified maintaining a discriminatory practice favoring men or whites by admitting that the sovereign did not want to make a politically unpopular choice, the public outcry would have been deafening. Discrimination is no less abhorrent when it works in favor of a traditionally disadvantaged group. To distinguish *Manhart* on the ground that the California plan discriminated against women while the Florida plan discriminated against men

is untenable. The discrimination is the thing, regardless of victim.

Since the original finding of liability, the Ninth Circuit has decided *Probe v. State Teachers' Retirement System and Teachers' Retirement Board*, numbers 81-5865, 81-5866, slip op. (9th Cir. Jan. 13, 1986), cited by defendants. In *Probe*, the Ninth Circuit found that because of the "open-market" exception in *Manhart*, the defendant fund "reasonably could have assumed that it was lawful to provide an optional annuity system that reflected plans offered by insurance companies on the open market." *Probe* at 13 (emphasis added). This court believes this statement to be a fundamental flaw in the rationale denying retroactive damages. The open market exception of *Manhart* clearly applies to third-party transactions. Footnote 33 of *Manhart* leaves no doubt as to this application by noting the obvious—Title VII governs relations between employers and employees, not between employees and third parties. The *Manhart* court goes further to warn employers that "shell" corporations used to discriminate will not be tolerated. *A fortiori*, discriminatory practices of employers themselves, whether they "reflect" the open market or not, are unlawful.

The polestar for judging the appropriateness of retroactive damages is *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). *Albemarle* states that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 421. The *Albemarle* presumption in favor of retroactivity allocates to defendants the burden of proving reasons which

would not frustrate the central purpose of the statute. *Manhart* teaches that the *Albemarle* presumption can seldom be overcome, "but it does not make meaningless the district court's duty to determine that such relief is appropriate." *Manhart* at 719.

Plaintiffs injected the issue of "bad faith" as a bar to equity. *Albemarle* holds that, while "bad faith" is not a sufficient reason for denying back pay, if the employer has shown "bad faith," he can "make no claim whatsoever on the Chancellor's conscience." *Albemarle* at 422. *Albemarle* indicates that an employer shows bad faith "by maintaining a practice which he knew to be illegal or of highly questionable legality." *Id.* Plaintiffs maintain that the defendants' wait-and-see policy constitutes bad faith in light of the evidence of the memoranda from Gibney, Boge and Kiesling, the early district court cases, *Manhart*, the industry trends, and the trends in other states.

This court agrees after hearing the evidence that the defendants wait-and-see policy was a product of poor judgment. None of the principals involved in the decision-making harbored any evil intent or design. Rather, it was clear from their testimony that none of them could believe that the Supreme Court meant what it said in *Manhart*. The *Manhart* decision was so contrary to all actuarial principles that the defendants turned a deaf ear to the *Manhart* message. However, this court is not aware of any jurisprudential justification for waiting for the highest court in the land to repeat itself. *Brown v. Board of Education* was given as an example of the Supreme Court rendering further decisions to guide state officials. In all those unanimous implementing decisions following *Brown*, how-

ever, the court never waived from its clear command to desegregate. Why the defendants thought the Supreme Court would change its mind after *Manhart* has never been explained; perhaps the defendants wanted a direct order from the United States Supreme Court to the FRS to change its policies. And yet, defendants never requested an opinion from the Attorney General of Florida nor even a declaratory judgment from this court or a state court. It is clear that the defendants refused to act on the misplaced assumption that there would be no retroactive damage award. *Manhart* states, almost naively, that "there is no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision." *Id.* at 720, 721. Unfortunately, in Florida that prophecy has proved incorrect.

Plaintiffs are perhaps correct that the double-sex change change method is the only method which would equalize payments between males and females, but equalization is not the goal. All that plaintiffs are entitled to recover are those amounts they would have received if the sex-based tables had not been in effect. *Manhart* at 719, n.36. Thus, this court finds that the unisex method is the proper calculation.

On the other hand the court is not convinced by defendants' argument that proration is a proper method of calculating damages. The state did not use proration when it changed over to unisex tables in 1983. Furthermore, proration has no relationship to the mechanics of the FRS. See, Order, March 1, 1985 (document 2778) and stipulated finding of fact #5. Mr. Tierney merely demonstrated how proration in any given situation would work; he did not



vouch for the applicability of the method. The court understands the notion of "proration;" however, given the method by which retirement benefits are calculated under the FRS, proration has no applicability. Proration presupposes level payment or level contribution. Such is not the case here, where contribution, by the employer, depends on the size of the payroll and where benefits to the employee are based on an average compensation during the five highest income years.

The court is not unmindful of the "difficulty of amending a major pension plan," *Manhart* at 719, n.36, and in that regard it is fair to allow the state officials some time after *Manhart* for study and implementation of legal mortality tables. The evidence is clear that adoption of the unisex table, because it was cost-free, would not, and did not, require legislative action. In May of 1981, Gibney estimated that the unisex tables could have been inaugurated within five months. Plaintiffs' exhibit 25. The court concludes that a five-month delay after *Manhart* is a reasonable time within which to bring the FRS into compliance with the *Manhart* rule. Thus, taking into consideration all the evidence, the court holds that retroactive damages shall not accrue before October 1, 1978.<sup>1</sup>

As to prospective damages, the monthly benefits of all class members and/or their joint annuitants, i.e., those

<sup>1</sup> The court's prior ruling as to the statute of limitations will remain undisturbed. See, Order, document 2778. *Hill v. Metropolitan Atlanta Rapid Transit Authority*, 591 F.Supp. 125 (N.D. Ga., 1984) and the discussion of this "same time frame" requirement is inapposite because that case involves a multiple-plaintiff, non-class action suit. The case at bar must be analyzed by reference to the rules governing class actions.

members retiring after 1972 shall be entitled to have their monthly payments adjusted upward under the unisex "topping up" method from the date of judgment forward, positing April 30, 1986, as the judgment date. The court perceives no reason to continue to discriminate against those retirees.

Much was said at trial about the meaning of the phrase "actuarially sound" as it relates to the variables present in the underlying actuarial assumptions. Several principles are clear: (1) It is inappropriate to change an assumption in one circumstance without changing the same assumption across the board. (2) Some assumptions are more important than others, e.g., the mortality assumption is much less important than the rate of return assumption. (3) A relatively slight adjustment in one of the important assumptions, e.g., rate of return, makes a great difference in terms of money. It is also clear that the market-value method of accounting is not appropriate for judging actuarial balance. Further, the assumptions are made taking into account market fluctuations. Thus, it is a conclusion of this court that to use the figures of plaintiffs' expert to analyze the soundness of the FRS would misleadingly skew the figures. On the other hand, it is fair to pit actuary against actuary to test the impact of the award on the soundness of the plan.

In 1984, Tillinghast recommended a one basis point increase in the contribution rate. The state auditor attacked Tillinghast's report as "too optimistic" and recommended a 100 base point increase. The legislature eventually adopted a 25 base point increase. Defendants have offered Mr. Tierney and his firm as experts. If the court accepts



the expert's opinion as of 1984, then the 25 base points represent 24 more than needed to fund the FRS on an actuarially sound basis. The defendants were adamant in denying that this increase created a "slush fund," and this court in no way wishes to intimate an evil intent or motive in approving the increase. But the fact remains that there was an increase 24 base points over what defendants' expert considered necessary. The court appreciates that the contribution increase did not create a lump sum. However, the continued collection through contributions 24 bases points over and above what defendants' own experts have testified would be needed to keep the fund in actuarial balance would necessarily generate excess cash in the fund.

It is this court's opinion that the fund has the ability to pay the judgment in this case without a detrimental impact and that the harm will not fall on innocent third parties. The judgment can be paid either by fund reserves or by an increase in the contribution rate. If the latter, the burden will be borne by the employers for whom the plaintiffs worked. If the former, the evidence demonstrates that there are sufficient cash reserves and that the fund would not be bankrupted.

Defendants urge this court to consider the national impact of a retroactive damage award. *Mankart* and *Norris* indicate that a national perspective is appropriate in attending to the equitable nature of Title VII. However, the *Mankart* court was concerned about an overnight change in decisional law that would catch all retirement funds short. *Mankart* was decided eight years ago and *Norris* three years ago. It is inconceivable that any funds would be operated today in violation of *Mankart* and *Norris* since other states, like Florida, have been on notice that

they may face retroactive damage awards. Each case must be judged on its own facts; therefore, the judgment in this case should not have any national impact at all.

Defendants contend that plaintiffs' suit ought to be dismissed as to the individual defendants because EEOC complaints did not name these individuals. Defendants rely on *Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497 (11th Cir. 1985). *Bell* affirms, without discussion, the summary judgment in favor of two supervisors on the basis of *Terrell v. U.S. Pipe & Foundry Co.*, 644 F.2d 1112 (5th Cir., Unit B., 1981). This court had considered *Terrell* in the order determining the proper statute of limitations period. The same rationale is applicable to the issue of dismissal now under consideration; that is, that the EEOC complaint gave sufficient notice to the individual defendants even though they were not specifically named. Thus, these defendants will not be dismissed. The court will note that case has proceeded as an "official capacity" suit rather than a "personal capacity" suit, as evidenced by the automatic substitution of Gilda Lambert for Nevin Smith. See *Kentucky v. Graham*, — U.S. —, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

Based on the foregoing discussion, the court has extracted the following amounts from the stipulation which most nearly meet the amounts to be awarded, and hereby ORDERS that:

1. For the class members retiring after March 24, 1972, the court awards declaratory relief from that date forward to the date of judgment. From the date of judgment forward, the defendants are hereby ordered to adjust the payments to all class members and/or their joint

annuitants upward according to the unisex topping up method. This amount of damages is reflected in the stipulated amount of \$32,265,000.00 (stipulated factual finding 43(C)). This amount shall be adjusted downward by positing an April 30, 1986, judgment date.

2. For all class members retiring after October 1, 1978, the court hereby awards back-pay with interest from October 1, 1978, to the date of judgment under the unisex topping up method of calculation. This amount of damages is reflected in the stipulated amount of \$12,800,000.00 (factual finding 44(C)). This amount shall be adjusted downward by positing an April 30, 1986, judgment date; it shall be further reduced to reflect October 1, 1978, as the liability cut-off date rather than the April 25, 1978, date.

3. The parties are directed to file a joint proposal within thirty (30) days of the date of this order as to all matters necessary for implementing the award.

DONE and ORDERED this 29th day of March, 1986.

/s/ William Stafford  
Chief Judge

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

HUGHLAN LONG and S. DEWEY  
HAAS, individually and on behalf  
of all retired and present employees  
subject to the Florida Retirement  
System established by Chapter 121,  
Florida Statutes, and all joint  
annuitants thereunder,

Plaintiffs,

v.

THE STATE OF FLORIDA,  
a governmental body, and THE  
HONORABLE ROBERT  
GRAHAM, as Governor  
of the State of Florida,

Defendants.

(Filed March 16, 1986)

This cause was heard by the court on February 8, 1984, on plaintiffs' and defendants' cross-motions for summary judgment. Argument was also heard on several other pending motions. The court having considered the record and having heard the argument of counsel and being otherwise fully advised in the premises, it is ORDERED AND ADJUDGED:

1. Defendants' motion to abstain and dismiss or stay is DENIED as moot.

2. Defendants' motion to dismiss as to plaintiff Long is GRANTED for all claims except the Title VII claim.

TCA  
82-1056-WS

ORDER



Res judicata bars all claims which were or could have been raised in the previous suit. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Under 28 U.S.C. § 1738, federal courts are required to give the same preclusive effect to a state judgment as the judgment would be given in that state. Federal courts therefore must look to state law in determining preclusive effect. The Florida Supreme Court ruled in *Gordon v. Gordon*, 59 So. 2d 40, 44 (Fla.), cert. denied, 344 U.S. 478 (1952), that res judicata "bars a subsequent suit between the parties based on the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised . . . ."

Plaintiff Long in this case raised his Title VII claim in an administrative appeal to the Florida First District Court of Appeal. That court ruled that it had no jurisdiction to hear the Title VII claim. *Long v. Dept. of Administration, Division of Retirement*, 428 So. 2d 688 (Fla. 1st DCA 1983). Until that ruling, the law was not settled as to whether a Title VII action could be brought in that court. Plaintiff was therefore precluded from fully litigating his Title VII claims and cannot be said to have had a "full and fair opportunity" to present his case.

Defendants argue that state law provides a remedy similar to that of Title VII and that, since plaintiff Long could have raised the state law claim and did not, his Title VII claim should be barred as well. Under *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1980), it is clear that a plaintiff whose cause has been fully litigated under a state law "at least as broad" as Title VII will be collaterally estopped from relitigating the issue of employment discrimination under Title VII.

However, where a plaintiff has not raised a similar state statute and the claim has not been fully litigated, it

cannot be said that his Title VII claim is collaterally estopped. Moreover, the plaintiff cannot be barred by res judicata from bringing a cause of action which could not have been raised in the previous suit. The fact that another claim could have been raised is not germane.

In the case at bar, the state court had not yet ruled as to its jurisdiction over Title VII claims. Plaintiff Long duly raised this claim but did not obtain a judgment on the merits. Under these circumstances, plaintiff cannot be barred from raising this claim in federal court.

3. Mr. Carl A. Rassler's motion to intervene as plaintiff is GRANTED.

4. Plaintiffs' motion for rehearing on decertification of class "B" is DENIED. This court is under a mandate to protect the interests of the nonappearing class members and to continually reassess the appropriateness of the class certification. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 n.11 (1978); *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F.2d 457, 462 (5th Cir. 1978). The class as originally stipulated to by the parties and certified by the court included all male persons retired and receiving benefits under options 2, 3, or 4 of Florida Retirement System, all male persons currently employed who are entitled to vested pension or retirement plan benefits, and all persons, male or female, holding rights as joint annuitants under the Florida Retirement System.

Because the Florida Retirement System (FRS) was changed as of August 1, 1983, to conform to the nondiscrimination requirements of Title VII, the court deems it necessary to distinguish the claims of those class members retiring on or after that date. Under Federal Rule of



Civil Procedure 23(c)(1), "[t]he district court has a continuing power" to alter or amend its certification order before decision on the merits. *Elster v. Alexander*, 608 F.2d 196, 197 (5th Cir. 1979). Rule 23(c)(4) gives the court power to divide the class into subclasses. The court hereby modifies its certification ruling to certify class members retiring on or after August 1, 1983, as a subclass in the present action under Federal Rule of Civil Procedure 23(b)(2). The court hereby decertifies those same class members under Federal Rules of Civil Procedure 23(b)(1) and (b)(3).

Class members who retired before August 1, 1983, remain certified under Federal Rules of Civil Procedure 23(b)(1), (b)(2), and (b)(3).

5. Plaintiffs' motion for discovery sanctions is DENIED at this time. The court reserves the right to modify this ruling at a later time if it deems it necessary.

6. Plaintiffs' pendent state law claims are DISMISSED under *Pennhurst State School and Hospital v. Halderman*, 52 U.S.L.W. 4155 (1984).

7. Plaintiffs' claims under 42 U.S.C. § 1983 are DISMISSED. Under the U.S. Supreme Court's rationale in *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979), to allow the plaintiffs to maintain an action under § 1983 on substantive rights created by Title VII would defeat the "comprehensive plan" designed by Congress in enacting Title VII by allowing plaintiffs to "completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress." 442 U.S. at 376.

Plaintiffs also base their § 1983 claim on the equal protection clause of the fourteenth amendment. In *Shinholster v. Graham*, 527 F. Supp. 1318 (N.D. Fla. 1981), this court held that claims for money damages under § 1983 against the state and state officials in their official capacities are barred by the eleventh amendment. Under the test laid down in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), defendants have qualified immunity in their individual capacities unless their actions violated "clearly established statutory or constitutional rights." Because, in *Long v. Department of Administration, Division of Retirement*, 428 So. 2d 688 (Fla. 1st DCA 1983), the state court held that FRS was not violative of the fourteenth amendment, the defendants could not have violated clearly established law.

Of the remedies available under § 1983, only prospective injunctive relief remains. However, according to plaintiffs' brief, their prayer for future relief is considered "retroactive" because it will require retroactive funding of the FRS contribution base. Prospective injunctive relief is therefore inappropriate, and plaintiffs' claims under § 1983 are dismissed as unredressable.

8. Defendants' motion for dismissal for lack of Article III subject matter jurisdiction is DENIED.

9. Defendants' motion to dismiss as to plaintiff Haas is DENIED.

10. Also before the court for consideration is the motion of Vertie V. Prater to withdraw her request for exclusion from the class. Mrs. Prater states that she did not understand her rights when she asked to be excluded, and, now that she does understand, she would like to be

allowed to participate. Defendants oppose the motion on the grounds that Mrs. Prater's reasons for wishing to withdraw her request are not exceptional and could easily apply to all other potential class members who have opted out. Defendants contend that a precedent would be set which would allow a number of potential class members to opt back in. They therefore do not consent to her reinstatement and claim they would be prejudiced thereby. The only case cited to the court on this issue allowed the class member to reenter the class. In that case, the member's reentry was stipulated to by the parties, and the court determined there would be no prejudice to either side. Under the law pertaining to Rule 23(b)(3) class actions, Mrs. Prater had thirty days in which to determine her rights before opting out. Because defendants oppose this motion and claim prejudice to their case, the motion by Mrs. Prater to withdraw her request for exclusion is DENIED.

11. Plaintiffs' motion for summary judgment under Title VII is GRANTED as to liability. The court hereby awards declaratory relief only.

12. The determination of whether this court has the discretion to award damages in this case rests on the question of the preclusive effect of the Supreme Court's "prospective-only" decision in *Arizona Governing Committee v. Norris*, — U.S. —, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 (1983). Retroactive damages were denied in *Norris* for two main reasons, one given in Justice Powell's opinion and one in Justice O'Connor's opinion. Writing for the majority on damages (with Justice O'Connor concurring separately), Justice Powell emphasized that the question

of whether Title VII would be applied to an employer providing a retirement benefit program through private insurance companies had not been decided by the Court. *City of Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978), had expressly said: "Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefits which his or her accumulated contributions could command in the open market." *Norris*, 77 L. Ed. 2d at 1250, quoting *Manhart*, 435 U.S. at 717-718. Thus, Justice Powell concluded that, because of this open market exception, employers had no previous notice that third-party insurer programs could be illegal. He therefore denied retroactive damages, stating that "[a]n employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market." 77 L. Ed. 2d at 1263.

Justice O'Connor, however, did not agree that the Court's holding concerning third-party insurers was unforeshadowed. She found that "[d]espite Justice Powell's argument, the result in *Manhart* is not distinguishable from the present situation." 77 L. Ed. 2d at 1264. She, on the other hand, was concerned that retroactive damages would "jeopardize the entire pension fund," and therefore made the award prospective only. Moreover, she was convinced that a retroactive holding was not necessary to force pension plan administrators "who may have thought until our decision today that Title VII did not extend to plans involving third-party insurers," to conform to the Court's decision. 77 L. Ed. 2d at 1265.



The issue of "open market" annuities, on which the *Norris* denial of retroactive damages centered, is not applicable to the case at bar. The Florida Retirement System is employer-operated and mandatory for its employees. Thus, although the precise issue of unequal benefits was decided in *Norris*, the court finds that the denial of retroactive damages in *Norris* is not preclusive in this case.

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Supreme Court established a strong presumption in favor of back pay awards in Title VII cases: "Back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U.S. at 421. The court went on to say that good faith is not a defense to a Title VII violation, and a showing of bad faith is not required. *Id.* at 422-23.

Although recognizing the presumption that retroactive damages are appropriate in Title VII cases once liability is established, both *Norris* and *Manhart* advised caution in the award of damages. "The Albemarle presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district court's duty to determine that such relief is appropriate." *Manhart*, 435 U.S. at 719. In denying retroactive damages, the Court in *Manhart* gave three grounds for the action: (1) because it was a "marked departure from past practice, . . . conscientious and intelligent administrators . . . may well have assumed that a program like the Department's was entirely lawful"; (2) "[t]here is no reason to believe that

the threat of a back pay award is needed to cause other administrators to amend their practices to conform to this decision"; and (3) "[r]etroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties." *Id.* at 720-23. On these three grounds, the court denied retroactively "[w]ithout qualifying the force of the Albemarle presumption in favor of retroactive relief. . . ." *Id.*

Justice O'Connor, in her *Norris* concurrence, gave a similar analysis, using the guidelines set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *Chevron* gave three criteria: (1) whether the decision establishes "a new principle of law, either by overruling clear precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) "whether retroactivity will further or retard the operation of the statute"; (3) "whether retroactive application would impose inequitable results." These criteria are substantially similar to the criteria used in *Manhart*. The mandate of the Supreme Court requires these criteria to be applied in determining the appropriate remedy in this case.

The precedent in this circuit for back pay awards was clearly established in *James v. Stockham Valves & Fittings Company*, 559 F.2d 310, 357 (5th Cir. 1977), and *Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211, 252-53 (5th Cir. 1975), modified on other grounds, 576 F.2d 1157 (5th Cir. 1978). *Bonner v. Prichard*, 661 F.2d 1206 (11th Cir. 1981). The current Fifth Circuit has recently reaffirmed these earlier rulings in *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608 (1983). Citing *James*, *Pettway*, and *Albemarle*, the Fifth Circuit wrote:



The statutory mandate of Title VII does not automatically require the court to exercise its equitable powers and award back pay in all circumstances; nevertheless, as the district court correctly observed, the remedial purposes of Title VII command back pay relief in all but "special circumstances." The court's discretion to deny back pay, once the class has been shown to have sustained economic loss, is "narrow."

*Id.* at 631.

Defendants contend that the *Norris* decision and not *Manhart* constituted the first notice that the Florida Retirement System benefit plan violated Title VII prohibitions. The *Manhart* decision held that an employer-operated pension fund that required women to make larger contributions than men to obtain equal benefits violated Title VII. The Court recognized that the pension system was founded on actuarially sound life expectancy tables. It, however, determined that sex could not be the discriminating factor in determining life expectancy. The Court found that Title VII focused on the individual and not the class, and that classifications in the employment context on the basis of sex, no matter how sound, were illegal.

The statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." 42 USC § 2000e-2(a)(1) [42 USCS § 2000e-2(a)(1)] (emphasis added). The State's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.

435 U.S. at 708.

An employment practice that requires 2,000 individuals to contribute more money into a fund than

10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner which but for that person's sex would be different."

435 U.S. at 711.

The Florida Retirement System calls for equal contributions but distinguishes between men and women in benefit levels under three of four options. *Norris* involved a similar situation. Defendants therefore claim that *Norris* and not *Manhart* decided the principle of law that applies to this case. In deciding *Norris*, however, the majority of the Supreme Court relied almost exclusively on the Court's decision in *Manhart*. Justice Marshall quotes extensively from the *Manhart* language, as does Justice O'Connor in her concurrence:

The court in *Manhart* found Title VII's focus on the individual to be dispositive of the present question. Congress in enacting Title VII intended to prohibit an employer from singling out an employee by race or sex for the purpose of imposing a greater burden or denying an equal benefit because of a characteristic statistically identifiable with the group but empirically false in many individual cases. See *Manhart*, 435 U.S., at 708-710, 55 L. Ed. 2d 637, 98 S. Ct. 1370.

77 L. Ed. 2d at 1264. The dissent in *Norris* does not challenge the majority finding on this issue. Rather, the dissent disagrees with the third-party insurer liability finding.

Like the Court in *Norris* and every other court but one that decided the issue, I see no meaningful distinction between discrimination at the pay-in stage as in *Manhart*

and in the pay-out stage as in the case at bar. In either case, there is discrimination in compensation for equal work on the basis of sex, as prohibited by Title VII. As *Manhart* said, "[O]ne cannot say that an actuarial distinction based entirely on sex is 'based on any other factor than sex.' Sex is exactly what it is based on." 435 U.S. at 712-13 quoting 553 F.2d 581, 588 (9th Cir. 1976). *Manhart* condemned the use of sex-based actuarial tables. Even though the particular facts of that case dealt with the pay-in stage only, the state could not have reasonably assumed, in light of the Court's rationale and explicit language, that it could nevertheless continue to use sex-based tables at the pay-out stage.

As early as 1972, the Equal Employment Opportunity Commission promulgated federal regulations under "Guidelines on Discrimination Because of Sex," stating: "It shall be an unlawful employment practice for an employer to have a pension or retirement plan which . . . differentiates in benefits on the basis of sex." 29 C.F.R. § 1604.9(f) (1980). Suits were filed concerning this issue as early as 1974. (*See Spirit v. Teachers Insurance & Annuity Association*, 691 F.2d 1054, 1067 (2nd Cir. 1982).) The Supreme Court's decision in *Manhart* came down in 1978. After *Manhart*, as Justice Marshall notes in *Norris*, every lower court but one found liability on this issue. Thus, neither the Supreme Court's decision on this issue in *Norris* nor this order today establishes a new principle of law or a marked, unforeshadowed overruling of precedent. Under the first criterion, then, retroactive damages would not be prohibited.

Regarding the second criterion, Justice O'Connor explained: "Manhart held that a central purpose of Title

VII is to prevent employers from treating individual workers on the basis of sexual or racial group characteristics." *Norris*, 77 L. Ed. 2d at 1265. It is difficult to see how awarding retroactive damages in this case would "retard the operation" or "frustrate the purpose" of the statute.

The third criterion requires the court to consider the impact of retroactive damages on the pension fund. Although the necessity of using public funds to provide damages is not sufficient reason to deny back pay awards, *Carpenter*, 706 F.2d at 632, *Norris* and *Manhart* both compel this court to consider whether the award would devastate the pension fund and harm "innocent third parties." The information before the court at this time is not sufficient for a decision on this point, and the parties are therefore requested to prepare appropriate memoranda. Defendants, according to their letter of February 14, 1984, were to provide the court with the results of their research by March 10. Defendants are directed to do so by March 23. Plaintiffs shall have ten days thereafter to respond.

DONE AND ORDERED this 15th day of March, 1984.

/s/ William Stafford  
Chief Judge

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

HUGHLAN LONG, et al.,

Plaintiffs,

TCA  
82-1056

v.

ORDER

STATE OF FLORIDA, et al.,

Defendants.

(Filed April 26, 1984)

Before the court for consideration is defendants' motion for reconsideration of the liability finding in the court's order of March 16, 1984. Defendants contend that (1) intent to discriminate was not established and (2) the fourteenth amendment, the constitutional source for Title VII as applied to governmental employers, requires the establishment of discriminatory motive or animus.

Defendants seek to argue that "plaintiffs to prevail under Title VII must first prove defendants' intent to discriminate, must first prove defendants' discriminatory motive or animus even to establish actionable liability." (Document 2717, p. 13) Defendants also endeavor to distinguish the intent issue from the "bad faith" issue previously found irrelevant by this court under the rule of *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422-23 (1975). Defendants cite numerous cases supporting the proposition that intent is a requisite element in a discrimination case brought under the fourteenth amendment. The court

is well aware of that requirement. It is irrelevant in this case, however, as the plaintiffs' fourteenth amendment claim has already been dismissed by the court's previous order.

Defendants cite no cases holding intent as a necessary element in a Title VII case. Indeed, it appears that they could not, for the question of intent was disposed of by the former Fifth Circuit in 1979. In *Scott v. City of Anniston, Alabama*, 597 F.2d 897 (5th Cir. 1979), cert. denied, 446 U.S. 917 (1980), defendants put forward the same argument used here. In response, Judge Rubin wrote:

We hold, on both principle and authority, that proof of intentional discrimination is not essential to recovery in a Title VII action even when the employer is a government agency, and that the requirement of equal employment opportunity prohibits all invidious employment practices, even those not intended to achieve a prohibited end.

To the extent that plaintiffs' Title VII claim can be considered a disparate treatment claim rather than a disparate impact claim, proof of discriminatory motive would be necessary. *Burdine v. Texas Department of Community Affairs*, 608 F.2d 563, 566 (5th Cir. 1979). This requires proof that plaintiff was treated differently because of gender. *Id.* If reconsideration and clarification of the court's summary judgment order is necessary, the court has no difficulty determining that the State of Florida treated people differently in its retirement system *because of their gender*. No other reasonable interpretation can be placed on the use of sex based actuarial tables. The United States Supreme Court in *City of Los Angeles De-*



*partment of Water and Power v. Manhart*, 435 U.S. 702 (1978), held that the use of such tables was discriminatory because individuals were treated differently because of their membership in a gender-defined class. Defendant's liability in the case at bar follows from *Manhart*.

As reflected in the March 16 court order, the only issue remaining in this case is the amount of damages and the potential impact on the Florida Retirement System (FRS) of a retroactive reward. Plaintiffs and defendants have filed memoranda and affidavits on this question, but there is considerable disagreement between the methods used and the resulting figures. It is apparent that more direction is needed from the court as to the measure of damages and the size of the class. Specifically, the court determines:

(1) Potential class members who previously opted out should, of course, not be included in the calculations of damages in this case.

(2) The measure of damages will be calculated in two ways: first, the difference between the benefits actually paid and those that would have been paid had the FRS adopted the "unisex" tables now in use; second, the "topping up" difference between male and female benefits. For purposes of the "topping up" method, the calculations shall be done with a change in the gender of the male member only. No change in the gender of the joint annuitant should be considered. The parties should thus agree on two figures, one for the "unisex" level of benefits, and one for "topping up."

(3) The class of retirees entitled to recover damages will be limited to those retiring after April 25, 1978,

the date of the Supreme Court decision in *Manhart*, 435 U.S. 702 (1978). *Manhart* denied the award of retrospective damages for the reasons set out in the previous order. Therefore, had this court awarded damages immediately after *Manhart*, it would have been limited to prospective-only awards, i.e., only for those retiring after that decision came down. Since this court has determined the law as set forth in *Manhart* to be dispositive of this case, damages retrospective from that date would not be appropriate.

With these guidelines, the parties are directed to consult and agree on the proper amount of lump-sum damages for the time period from April 25, 1978, to January 1, 1985—taking January 1, 1985, as a hypothetical award date. Parties shall also stipulate to a reasonable rate of interest and the amount of future benefits, separating those to be immediately funded and those to be funded later. The parties are directed to submit their stipulated results to the court no later than May 31, 1984.

With the proper damages amount before the court, a hearing may then be set to determine the potential impact of that amount on the FRS.

It is therefore ORDERED and ADJUDGED:

1. Defendants' motion for reconsideration (document 2719) is DENIED.

2. The parties are directed to consult and submit the report described in the order no later than May 31, 1984.

DONE and ORDERED this 25th day of April, 1984.

/s/ William Stafford  
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

HUGHLAN LONG, et al.,

Plaintiffs,

TCA  
82-1056-WS

v.

ORDER

STATE OF FLORIDA, et al.,

Defendants.

(Filed March 1, 1985)

On April 25, 1984, this court issued an order that, *inter alia*, limited the class of retirees entitled to receive money damages to those retiring after April 25, 1978, the date of the decision in *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978). The parties were also directed to calculate damages under the "unisex" method and the "topping up" method, without changing the gender of the joint annuitant. The question of impact on the FRS was left open. The parties, through their respective motions for reconsideration, pointed out problems inherent in using these limitations. Oral arguments on the issue were presented on November 8, 1984.

The court must point out that whether retrospective damages are appropriate at all has not been determined. This is because the third criterion governing the propriety of such damages, the impact on the pension fund, has not yet been determined. One purpose of both the March 16,

1984, order and the April 25, 1984, order was to direct the parties to stipulate to potential damages under the limitations imposed in the orders so that the court could factor in the impact criterion. It should also be noted that the class definition in this case has never been changed; the April order only limited money damages to those class members retiring after April 25, 1978.

In any event, after hearing argument and reviewing the relevant case law, the court modifies its orders and directs the parties to stipulate damage amounts for each of the following permutations.

A. Damages for the class retiring after April 25, 1978, the date of the *Manhart* decision

(1) under the "unisex" method

(2) under the "topping up" method

— (a) under (1) and (2) changing the gender of the male member only. (The parties have already calculated this figure)

(b) under (1) and (2) changing the gender of the joint annuitant in addition to changing the gender of the male member.

B. Damages for the class retiring after March 24, 1972, the effective date of Title VII, but with adjustments in payments only from April 25, 1978

(1) under the unisex method

(2) under the "topping up" method

(a) under (1) and (2) changing the gender of the male member only

(b) under (1) and (2) changing the gender of the joint annuitant in addition to changing the gender of the male member.

C. Damages for the class retiring after April 25, 1978, under the state's pro rata plan.

The parties should be aware that these figures are only to be used as a guide in determining impact; the court has not determined which method is proper. For example, the pro rata method suggested by the state is extremely problematical since FRS is a non-contributory plan in that employees themselves do not contribute. Also since benefits are determined by the employee's five highest years of salary, it is difficult to see how pro rata damages can be determined or, if they can, how they will be appropriate. However, the state should be given the opportunity to make its calculations and to present its argument at the impact hearing.

#### THE STATUTE OF LIMITATIONS

The parties agree that the award is limited by the two-year statute of limitations provided in 42 U.S.C. § 2000e-5 but disagree as to when that statute began to run. The court finds that December 27, 1977, is the proper cut-off date for the two-year statute of limitations period.

Mr. N. Louis Samaha filed his charge with the EEOC on December 27, 1979, naming the Pinellas County Board of Public Instruction as the employer that discriminated against him. Affidavit, document 2740. On August 25, 1981, he filed an amended charge naming State of Florida, Department of Administration, Division of Retirement. Attachment to document 2738. However, in the particu-

lars listed in his original charge, he complains exclusively about the Florida Retirement System and discrimination in retirement benefits.

Charges filed with the EEOC are to be liberally construed. *Tillman v. City of Boaz*, 548 F.2d 592 (5th Cir. 1977). Amended charges that merely clarify allegations "relate back" to the date of the earlier charge. *Terrell v. United States Pipe and Foundry Co.*, 644 F.2d 1112 (5th Cir. Unit B 1981). Since Samaha's whole charge related only to the FRS, and since the DOA administers the FRS, the scope of the EEOC investigation would have included the DOA. See, *Hamm v. Members of Board of Regents*, 708 F.2d 647 (11th Cir. 1983).

#### OTHER PENDING MATTERS

1. Plaintiffs' renewed motion to open discovery (document 2770) is GRANTED.

2. Plaintiffs' motion for permanent injunction (document 2769) is DENIED.

3. Pursuant to Rule 16, Federal Rules of Civil Procedure, the plaintiffs' attorneys shall initiate a conference with defendants' attorneys on or before April 1, 1985. At or before such conference, counsel for both parties shall determine the damage amounts in this order; counsel shall also agree on dates for ending discovery, for a pre-trial conference and for trial on the damages. A stipulation as to these matters shall be filed within three days after the conference. Upon receipt of the stipulation, the court will set trial. Of course if the parties are able to confer earlier, the court would welcome an earlier response.



Accordingly, it is ORDERED:

1. The April 25, 1984, order is modified in accordance with this order.
2. The parties are to stipulate to damages in accordance with this order.
3. The parties are to hold a scheduling conference on or before April 1, 1985, and to submit a proposed schedule within three days of the conference.
4. Plaintiffs' renewed motion to open discovery (document 2770) is GRANTED.
5. Plaintiffs' motion for permanent injunction (document 2769) is DENIED.

DONE and ORDERED this 28th day of February, 1985.

/s/ William Stafford  
Chief Judge

---

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA

CASE NO. TCA 82-1056-WS

HUGHLAN LONG, et al.,

Plaintiffs,

vs.

PRETRIAL  
STIPULATION

STATE OF FLORIDA, et al.,

Defendants.

---

I. JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343. The substantive statute involved is Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

II. NATURE OF THE ACTION

This is a class action for monetary and injunctive relief arising under Title VII of the Civil Rights Act of 1964. On March 15, 1984 the Court granted Plaintiffs' Motion for Summary Judgment adjudicating the Defendants, The State of Florida, et al, liable under Title VII for unlawful discrimination against Plaintiffs' class in the operation of the Florida Retirement System (FRS), by reason of the use of sex-distinct mortality tables to calculate monthly annuity payments for those persons who retired prior to August 1, 1983. The Court granted declaratory relief only. Reserved was the issue of whether the

court would award monetary relief based on its assessment of "whether the award would devastate the pension fund and harm 'innocent third parties.'" This use of sex-distinct mortality tables resulted and continues to result in smaller monthly annuity payments to males, and their joint annuitants or beneficiaries, than to similarly situated females and their joint annuitants or beneficiaries. The pleadings presently raising the issues are Plaintiffs' Amended Class Action Complaint dated August 26, 1982, (attached to Doc. 55) and Defenses and Answer to Amended Complaint by Defendants dated February 2, 1983) (Doc. 69).

### III. PARTIES' STATEMENT OF THE CASE

#### A. PLAINTIFFS' STATEMENTS OF THE CASE

The issue of impact should not be considered by the Court in its determination of the amount of monetary relief to be awarded to the members of Plaintiffs' class unless the Defendants first establish their entitlement to raise this equitable defense. In order for Defendants to overcome the initial threshold of establishing their right to raise the equitable impact defense, Defendants must first prove that they did not act in bad faith by maintaining a practice they knew was illegal or of highly questionable legality.

After the *Mankart* decision, the Defendants could not have reasonably assumed that the FRS pension fund was lawful. Moreover, Defendants' correspondence and inter-office memoranda between 1976 and 1983 establish that during those years the Defendants did not assume their pension plan to be lawful, or at the very least, knew it to be

of highly questionable legality. Therefore, until the Defendants first establish that they did not act in bad faith, the Court should not address the issue of impact in determining the amount of monetary relief to be awarded to the members of the Plaintiff class.

Defendants must next demonstrate that a devastating financial impact on the FRS would, in fact, result from an award of monetary relief to the members of Plaintiffs' class. Because the issue of devastating financial impact is an equitable affirmative defense, Defendants bear the burden of proof. In assessing the equitable issue of impact, the Court must not only consider the money held by the FRS fund, but must also consider all funds and assets belonging to the State of Florida.

Monetary relief in this case will not have the requisite devastating impact necessary to deny a monetary award to the members of Plaintiffs' class. Also, the Florida legislature on October 1, 1984 has already solved any financial problems that may have arisen as a result of the damage award in this case by adopting contribution rates .24% greater than the planned and anticipated contribution rate. This .24% increase translates into a present value of approximately \$300 million or more in additional funding to the FRS. Even without these additional funds, the more than \$9 billion in the FRS trust fund alone would not be devastated by an approximately \$200 million damage award, assuming a double sex change. The Florida legislature has the power and the duty to fund any financial impact arising from a damage award in this case. Under the Florida pension plan, regular legislative maintenance is necessary to keep the plan in actuarial balance because contributions paid into the plan's fund on behalf

of its members have no direct correlation to the benefits paid out to individual retirees. Similarly, the monetary relief to be awarded by this Court is simply a necessary judicial modification which redefines the benefits owed to Plaintiff class members and might merely make some further legislative maintenance necessary to pay the costs of such an award.

The double sex change topping up method for computing damages is the only method that will equalize the benefits paid to Plaintiff class members with those received by similarly situated female retirees. Although it would appear that Plaintiffs' claim is one of reverse discrimination against males, in reality, the discriminatory benefits paid to male class members arise as a direct result of discriminatory life expectancy assumptions applied to male class members when taken with their female joint annuitants. The double sex change topping up method requires changing the sex of both the class member and the joint annuitant for purposes of calculating retirement benefits. The measure of relief sought by the Plaintiffs is to have their benefits raised to the level of that paid to an identically situated female FRS member and her male joint annuitant under Options 3 and 4 and male members under Option 2 retroactive to the date of the *Manhart* decision and in the future.

Monetary relief should be available to all class members who were receiving benefits as of 1978 provided only that they retired sometime after March 24, 1972 (the effective date of Title VII). There is simply no reason to exclude class members who retired between 1972 and 1978 from recovering damages as to benefits paid after April

25, 1978. These persons retired after the date Title VII became applicable to government employees, and they are entitled to its protection. Moreover, the same reasons which compel allowing retroactive and prospective damages to class members who retire after April 25, 1978 also justify awarding such damages to all class members who retired after March 24, 1972, with respect to benefits paid after April 25, 1978. After the date of the *Manhart* warning, it was and is just as illegal under Title VII to pay disparate benefits on the basis of sex to class members who retired between 1972 and 1978 as to class members who retired after April 25, 1978.

Furthermore, Defendants' alleged issues involving Mssrs. Samaha, Long and Rassler and the scope of the class as defined by the filing of the EEOC administrative charge are not issues presently before this Court. Those issues were disposed of in this Court's Order of February 28, 1985, filed March 1, 1985. (Doc. 2778).

Finally, the proration theory proffered by Defendants is not an equitable or correct measure of calculating damages in this Title VII lawsuit. Plaintiffs contend that the estimated \$201 million dollar judgment sum already has been subjected to any reductions made necessary by equitable considerations. Furthermore, on August 1, 1983 when the Florida Department of Administration Division of Retirement adopted unisex tables for those persons retiring on or after August 1, 1983, no proration of contributions or benefits was involved. Therefore, to prorate Plaintiffs' retirement benefits herein would, inter alia, violate equal protection restraints under the Fourteenth Amendment.



## B. DEFENDANTS' STATEMENT OF THE CASE

The award of any monetary relief in this case will result in the imposition of additional liability upon the FRS retirement fund not previously anticipated or planned for. Moreover, as retirees under the FRS obtain a vested actuarial right to their retirement benefits as of the effective date of their retirement, under Florida law those retirement benefits may not for any reason be subsequently reduced by the State. This means that the State may not reduce the retirement benefits of any female retirees, or their joint annuitants or beneficiaries, who retired prior to August 1, 1983, in order to pay any increased retirement benefits which this Court may find due and which it may award to male retirees, or their joint annuitants or beneficiaries, who retired prior to August 1, 1983. In other words, the award of any monetary relief in this case will be paid solely by the State and the participating employers in the FRS and charged against the payroll of currently active members and not the retiree class.

Further, in assessing impact the Court must not only consider the impact that an award of any monetary relief would have on the FRS fund, but it must as well consider the impact which any such award might have on local governmental units (such as Florida counties) who participate in the FRS. Many of these local government employers are already in serious financial trouble, and the Court must consider if the award of monetary relief in this case would add to their financial difficulties. In addition, the Court must consider national impact, i.e., the effect of a holding by this Court that the FRS is liable for monetary relief back to the effective date of *Manhart* would have if

applied to other state retirement systems similar to Florida's which did not convert to unisex until August, 1983.

The proper scope of the class in this case has yet to be finally determined by the Court, and the class herein properly can only include those male retirees under the FRS who selected option 2, 3, or 4 thereunder and who retired before August 1, 1983, but no earlier than 300 days prior to plaintiff Long's EEOC Title VII administrative charge of discrimination filed on October 7, 1981, i.e., who retired no earlier than December 11, 1980. This means that, if the Court should decide to impose monetary relief in this case, the present damage calculations will have to be re-done to determine the actual proper amount of liability. In relation to this, both the initial and amended EEOC charges of intervening plaintiff Carl Rassler and noticed class member Louis Samaha (it being noted that the Court previously used Samaha's initial charge of December 27, 1979 to determine the cut-off date for class liability in this matter) were and are untimely because they were not filed within 300 days of the date of retirement of those individuals, and that both Rassler and Samaha retired more than 300 days prior to December 11, 1980 (the date which is 300 days prior to plaintiff Hughlan Long's October 7, 1981 charge of discrimination).

Further, the relation to intervening plaintiff Carl Rassler and noticed class member Louis Samaha, their initial EEOC Title VII administrative charges of discrimination failed to name or put on notice any of the Defendants herein that said two individuals were claiming sex discrimination in the payment of retirement benefits to them under the FRS. The first charges of these in-

dividuals which name and put the State on notice, and which were treated by the EEOC as putting the State on notice, were these individuals' amended charges of discrimination filed, respectively, August 24 and August 25, 1981.

It is also Defendants' position that, should the Court find that monetary relief should be awarded in this case, the proper measure of such can only be the difference between the amount the members of sub class A (the notice sub class in this case) are presently receiving under the old sex-distinct mortality tables and the amounts they would be entitled to receive under the new unisex tables. The award of any amount above that would be inequitable and would constitute unjust enrichment as the members of sub-class A, were they to retire today, would only be entitled to payment of benefits under the current unisex tables.

Finally, proration is an accepted actuarial technique. It is readily and fully applicable, should the Court determine monetary relief be awarded in this case, to the calculation of retirement benefits properly due the members of subclass A. Indeed, there are at least two, if not more, proration methodologies—contribution proration and benefit proration—which can readily be applied to the FRS to determine the amounts actually due the members of subclass A herein.

#### IV. PARTIES' LIST OF EXHIBITS

The list of the parties' Impact Hearing exhibits are attached to this Stipulation as Exhibit "A".

#### V. PARTIES' HEARING WITNESSES

The list of the parties' Impact Hearing witnesses are attached to this Stipulation as Exhibit "B".

#### VI. STIPULATED FACTS WHICH REQUIRE NO PROOF AT THE IMPACT HEARING

1. As presently certified, Plaintiffs' class consists of two distinct and separate subclasses. Subclass A, as presently defined, consists of all male members of the FRS who retired before August 1, 1983 and the joint annuitants or beneficiaries of those deceased male members who are presently receiving benefits under options, 2, 3, or 4 of the FRS. Subclass A is certified under Fed.R.Civ.P. 23(b) (1), (2) & (3). Subclass B consists of currently vested male members of the FRS or males who retired on or after August 1, 1983 under options 2, 3, or 4 of the FRS, and their joint annuitants or beneficiaries, and is certified under Fed.R.Civ.P. 23(b)(2).

2. The Defendants are the State of Florida, the Honorable Robert Graham as Governor of the State of Florida, Andrew J. McMullian, III, director of the Division of Retirement of the State of Florida Department of Administration, and Gilda Lambert, present Secretary of the Florida Department of Administration who, by operation of Fed.R.Civ.P. 25(d), has been substituted in place and instead of Nevin Smith, the previous Secretary of the Florida Department of Administration and an initially named defendant.

3. Plaintiffs' subclass A, excluding those persons who retired between June 1, 1983 and July 31, 1983, has been

properly noticed pursuant to Fed.R.Civ.P. 23(c)(2), and includes all persons noticed who have not opted out.

4. The State of Florida, for the purposes of Title VII, is the "employer" of the members of the plaintiffs' class, and is authorized and charged under the Florida Statutes with the duty and responsibility of lawfully administering the FRS. No third party unrelated to the State of Florida is authorized to or does administer the FRS fund.

5. The FRS is a defined benefit plan rather than a defined contribution plan. Under the FRS plan, the vested benefits owed are calculated by computing an average final compensation based upon the average annual compensation for the five highest paying years of compensation preceding retirement.

6. The State of Florida's use of sex-distinct actuarial tables has resulted in lower monthly benefits to male class members in subclass A than to their similarly situated female counterparts.

7. The State of Florida is contractually precluded from lowering the amount of retirement benefits to an employee once the employee has retired and has received his or her retirement option benefit.

8. For 1983, the actuarial value of the FRS plan assets was \$6,511,000,000.00.

9. As of June 30, 1985, assets in the FRS trust fund were \$8.213 billion dollars.

10. Dr. E. J. Yelton, Executive Director of the State Board of Administration, testified in deposition in this

case on September 19, 1985 that the FRS fund existing to pay benefits then had a present value of 9 billion dollars.

11. From 1980 forward, the Division of Retirement has calculated the actuarial present value of benefits for all retirees receiving a benefit payment during July of each year and the actuarial present value of benefits for those members entitled to a deferred benefit are summarized as follows:

<u>Year</u>	<u>Actuarial Present Value*</u>
1980	\$2,340,300,000.00
1981	2,824,974,000.00
1982	3,242,009,000.00
1983	3,802,323,000.00
1984	4,142,611,000.00

\*For the years 1980, 1981, and 1982 the rate of interest assumed was 8½%. For the years 1983 and 1984, the rate of interest assumed was 9%. For all years, the 1971 Group Annuity Mortality Table was assumed; however, for 1983 and 1984, the mortality tables were set back three years.

12. For 1980 and 1983, the actuarial present value of vested accrued benefits as of the date of the FRS plan valuation are as follows:

<u>Year of Valuation</u>	<u>Actuarial Present Value</u>
1980	
Vested Accrued Benefits	\$5,134,048,000.00
1983	
Vested Accrued Benefits	6,382,782,000.00

\*Move to page 33; Number 11. [See p. A122, *infra*]



13. The actuarial present value of future payroll of the current FRS membership as of the valuation date indicated below is:

<u>Year</u>	<u>Actuarial Present Value</u>
1977	\$19,555,000,000.00
1980	34,215,000,000.00
1983	65,828,000,000.00

14. For the fiscal year ending on June 30, 1981, the FRS reported an addition to reserves (revenues less expenses and disbursements) of over \$539,086,368.00.

15. For the fiscal year 1982-1983, FRS revenues less expenditures were in excess of \$1,051,122,403.00.

16. For the fiscal year ending June 30, 1984, the FRS experienced a \$950,738,065.00 addition to reserves (total revenues less total expenses and disbursements).

17. For the fiscal year ending on June 30, 1985, FRS expects a \$1,166,639,933.00 addition to reserves (total revenues less total expenditures and disbursements).

18. For the fiscal year 1985-1986, total benefit payouts for FRS obligations are expected to be less than \$700,000,000.00.

19. In the opinion of the FRS consulting actuary the FRS would have been in actuarial balance had the Florida legislature adopted contribution rates no greater than those suggested by Tillinghast, Nelson & Warren, Inc. on the basis of the July 1, 1983 actuarial review.

20. The Florida legislature adopted contribution rates 24 base (basis) points higher than those suggested

by Tillinghast, Nelson & Warren, Inc. on the basis of the July 1, 1983 actuarial review and as published in the Florida Retirement Systems Bulletin, dated September, 1984. An additional base (basis) point was adopted and assigned to retiree costs of living increases.

21. A 0.25% increase in the FRS contribution rate is the equivalent of 25 base (basis) points.

22. Article X, Section 14 of Florida's Constitution requires that the FRS shall not provide any increase in the benefits to the members or beneficiaries of the FRS unless the FRS has made or currently makes provision for the funding of the increase in benefits on a sound actuarial basis.

23. As of April 25, 1978 (the date of the *Mankart* decision) the Department of Administration had the authority to adopt unisex tables and implement their use for all future retirees, if the tables adopted would not have an actuarial impact which would increase or decrease contribution rates.

24. As of April 25, 1978, the Department of Administration had not developed a no-cost method of implementing unisex tables but one was adopted as of August 1, 1983.

25. On August 1, 1983, the State of Florida, Department of Administration, Division of Retirement, adopted unisex tables applicable to those persons retiring on or after August 1, 1983, without any proration made after April 25, 1978.

26. Over 95% of the joint annuitants in Plaintiffs' class for those class members who chose options (3) and

(4) are, under Florida law, "spouses," of FRS members who are or were members of Plaintiffs' class.

27. Since 1975, contributions to the FRS have been made almost exclusively from public funds. Prior to 1975, contributions to the FRS were made both from public funds and from employee contributions. At all times the contribution rate for similarly situated males and females was equal.

28. The employers participating in the FRS are the state government and political subdivisions of the State of Florida, although not all political subdivisions of the State of Florida participate in the FRS.

29. There are over 1,100 local political subdivisions of the State of Florida which are participating in the FRS.

30. The Division of Retirement has calculated the rate of return on the FRS Trust Fund investments for the following fiscal years (ending June 30 of each year) as follows:

<u>Fiscal Year</u>	<u>Net Yield Rate</u>
1974 - 1975	7.25%
1975 - 1976	8.02%
1976 - 1977	8.19%
1977 - 1978	8.26%
1978 - 1979	8.61%
1979 - 1980	9.09%
1980 - 1981	9.60%
1981 - 1982	10.19%
1982 - 1983	9.68%
1983 - 1984	9.27%
1984 - 1985	9.00%

In calculating the above, the Division of Retirement excluded capital gains and losses; the valuation basis for bonds is the amortized value thereof; the valuation basis for equities is the cost thereof.

The valuation method used by the Division of Retirement is different than the method used by the State Board of Administration.

31. The FRS was created on December 1, 1970 out of the Teacher's Retirement System, the State & County Officer & Employees' Retirement System (SCOERS), and the Highway Patrol Pension Fund. In 1972 the Elected State Officers' Class was created as part of and the Judicial Retirement System was consolidated into the FRS.

32. In 1975 the FRS became employee-noncontributory for regular and special risk members. Thereafter, from 1975 to present, all contributions to the FRS for regular and special risk members have been made solely by such employees' employers.

33. From its inception in 1970 to present, the FRS has been funded by equal contributions as to similarly situated males and females, i.e., the contributions to the FRS made by or on behalf of males and females earning the same salary were and are identical.

34. The FRS retirement plan has and had four methods of options of benefit payments.

35. From its inception to present, the first and primary single-life method of benefit payment (Option 1) paid and pays similarly situated males and females the same monthly benefit, i.e., males and females of the same age retiring with the same length of service and the same

average final compensation receive and received the same monthly retirement benefit under Option 1.

36. Option 2 is and was a joint and survivorship option payable for the fixed period of ten (10) years. Prior to August 1, 1983, it was calculated using sex-distinct mortality tables which resulted in a lower monthly retirement benefit paid to males than to similarly situated females.

37. Option 3 is and was a joint-annuitant option payable for the joint lives of the retiree and his or her designated beneficiary. Prior to August 1, 1983, it was calculated using sex-distinct mortality tables which resulted in a lower monthly benefit paid to males than to similarly situated females.

38. Option 4 is and was a joint-annuitant option payable to the retiree and his or her designated beneficiary for their joint lives but which, upon the death of either, thereafter reduces and reduced by one-third ( $\frac{1}{3}$ ) the amount of the monthly benefit payable for the remaining life. Prior to August 1, 1983, it was calculated using sex-distinct mortality tables which resulted in a lower monthly benefit paid to males than to similarly situated females.

39. Under the FRS, retirement benefits are payable only to retirees of governmental employers participating in the FRS, which employees have reached a designated age and which employees have worked for at least ten (10) years for an employer participating in the FRS, i.e., ten (10) years of service with an FRS participating employer are required before an employee's right vests to receive retirement benefits from the FRS. With respect to the Elected State Officers Class (ESOC) only, vesting occurs in eight (8) years.

40. Historically and presently the FRS is advised prior to retirement that an employee who has vested rights to receive retirement benefits from the FRS plans to retire. The FRS calculates the retirement benefits which that employee would receive under each of the FRS' four options of benefit payment and supplies such information to the employee. The employee then elects the retirement option under which he or she wishes to receive retirement benefits, and the FRS then calculates that employee's retirement benefit under the option selected as of the employee's effective date of retirement. This final calculation of the retired employee's monthly retirement under his or her selected option is likewise supplied to the retired employee. Thereafter, the employee receives monthly retirement benefits under the option selected as calculated by the FRS with respect to the employee's effective date of retirement.

41. The monthly benefit, described in paragraph 40 above, may thereafter be and is increased by such things as costs of living adjustments or Acts of the Florida Legislature, but may not be and is never subsequently reduced.

42. Employer contributions to the FRS and the contribution rates for the designated classes within the FRS are summarized as follows:



## A110

Fiscal Year	Employer Contributions	Regular	Special Risk	Selected State Officers
7/75-6/76	\$312,000,000	9%	13%	8%
7/76-6/77	\$367,000,000	9%	13%	8%
7/77-6/78	\$377,000,000	9%	13%	12%
7/78-6/79	\$407,000,000	9.0/9.1%	13.00/13.95%	12.00/16.78%
7/79-6/80	\$499,000,000	9.1%	13.95%	16.78/20.78%
7/80-6/81	\$505,000,000	9.1%	13.95%	20.78%
7/81-6/82	\$639,000,000	9.10/10.93%	13.95/13.91%	20.78%
7/82-6/83	\$718,000,000	10.93%	13.91%	20.78%
7/83-6/84	\$790,000,000	10.93%	13.91%	20.78%
7/84-6/85	\$893,000,000	10.93/12.24%	13.91/14.67%	20.78%

NOTE: Where two rates are indicated, i.e., 10.93/12.24, the first rate, 10.93, applies to the first three months of the fiscal year and the second rate, 12.24, applies to the remaining nine months of the fiscal year.

43. The parties stipulate that any variance between the estimated damage values and the true damage values are immaterial to the issues now set for hearing on February 3-4, 1986. Damage estimates for class members retiring after March 24, 1972 are as follows:

1. *Double Sex Change*

Applying the tables in use by the FRS prior to August 1, 1983 and changing the sex in those tables of both the member and his joint annuitant, the liability to the FRS Trust Fund is estimated as follows:

As of July 1, 1985:

Payments with interest from May 1, 1978—	\$ 68,300,000.00
Present value of future payments to class members—	113,199,000.00

Total: \$181,499,000.00

As of July 1, 1986:

Payments with interest from May 1, 1978—	\$ 86,669,000.00
Present value of future payments to class members—	113,894,000.00

Total: \$200,563,000.00

## A111

2. *Single Sex Change*

Applying the tables in use prior to August 1, 1983 and assuming a change in the gender from those tables for the class member only, the liabilities to the FRS Trust Fund are estimated as follows:

As of July 1, 1985:

Payments with interest from May 1, 1978—	\$ 47,640,000.00
Present value of future payments to class members—	78,132,000.00

Total: \$125,772,000.00

As of July 1, 1986:

Payments with interest from May 1, 1978—	\$ 60,518,000.00
Present value of future payments to class members—	78,751,000.00

Total: \$139,269,000.00

3. *Unisex Method*

Applying the unisex tables adopted on August 1, 1983 to this class, the liabilities to the FRS Trust Fund are estimated as follows:

As of July 1, 1985:

Payments with interest from May 1, 1978—	\$ 19,846,000.00
Present value of future payments to class members—	32,108,000.00

Total: \$ 51,954,000.00

As of July 1, 1986:

Payments with interest from May 1, 1978—	\$ 25,182,000.00
Present value of future payments to class members—	32,265,000.00

Total: \$ 57,447,000.00

44. The parties stipulate that any variance between the estimated damage values and the true damage values are immaterial to the issues now set for hearing on February 3-4, 1986. Damage estimates for class members re-

## A112

tiring after April 25, 1978 (May 1, 1978 payroll entries) are as follows:

### 1. *Double Sex Change*

Applying the tables in use prior to August 1, 1983, by the FRS and changing both the sex of the member and his joint annuitant, the liabilities accruing to the FRS Trust Fund are estimated as follows:

As of July 1, 1985:

Payments with interest from May 1, 1978—	\$ 33,624,000.00
Present value of future payments to class members—	79,159,000.00
Total:	<u>\$112,783,000.00</u>

As of July 1, 1986:

Payments with interest from May 1, 1978—	\$ 44,375,000.00
Present value of future payments to class members—	79,821,000.00
Total:	<u>\$124,196,000.00</u>

### 2. *Single Sex Change*

Applying the pre-August, 1983 annuity tables to members of this class and assuming the member to be female rather than male, without changing the sex of the member's joint annuitant, the total additional liabilities accruing to the FRS Trust Fund are estimated as follows:

As of July 1, 1985:

Payments with interest from May 1, 1978—	\$ 23,660,000.00
Present value of future payments to class members—	55,132,000.00
Total:	<u>\$ 78,792,000.00</u>

As of July 1, 1986:

Payments with interest from May 1, 1978—	\$ 31,238,000.00
Present value of future payments to class members—	55,540,000.00
Total:	<u>\$ 86,770,000.00</u>

## A113

### 3. *Unisex Method*

Applying the unisex tables adopted on August 1, 1983 to this class, the liabilities to the FRS Trust Fund are estimated as follows:

As of July 1, 1985:

Payments with interest from May 1, 1978—	\$ 9,698,000.00
Present value of future payments to class members—	22,354,000.00
Total:	<u>\$ 32,052,000.00</u>

As of July 1, 1986:

Payments with interest from May 1, 1978—	\$ 12,800,000.00
Present value of future payments to class members—	22,510,000.00
Total:	<u>\$ 35,310,000.00</u>

45. The parties agree that the following results are arithmetically consistent with the methods of proration used. The Plaintiffs do not agree that the methodology is correct or that proration is appropriate in this case. Given this caveat, it is agreed to the following:

A. Proration is a commonly used and accepted technique used by actuaries as well as others.

B. Defendants suggest that several methods of proration could be applied in this case to allocate a total impact value before and after any date certain. The proration techniques give rise to mathematical formulas which are commonly used or commonly accepted, and yield results consistent with the method employed.

C. The stipulation does not address the propriety of proration for use in this particular case.

## I.

A. For what the Defendants have labeled "accrued benefit proration" the following allocation formula is applicable:

Pre-5/78 Portion:

Accrued Benefit at 5/78

Accrued Benefit at Retirement

Post-5/78 Portion:

(Accrued Benefit at Retirement

—Accrued Benefit at 5/78)

Accrued Benefit at Retirement

B. For what the Defendants have labeled "contribution proration", the following allocation formula is applicable:

Pre-5/78 Portion:

1 - Post 5/78 Portion

Post-5/78 Portion:

Contributions Made from 5/78 to Date  
of Retirement Accumulated at  
Valuation Rate of Interest

Account Balance or Reserve at Retirement

C. The above allocation formulas were applied individually to each participant.

A. The following proration values were obtained using the above formulas:

1. ACCRUED BENEFIT PRORATION

For May, 1978 Entry Date and July 1, 1985 Damages Date

a. <u>Unisex</u>	(Unprorated)	Prorated
Payments with Interest from May 1, 1978	\$ 9,777,247.00	\$ 2,034,099.00
Present Value of Future Payments	22,402,994.00	5,901,497.00
Total:	\$ 32,180,241.00	\$ 7,935,596.00

b. Single Sex Change

Payments with Interest from May 1, 1978	\$ 23,856,628.00	\$ 4,940,564.00
Present Value of Future Payments	55,247,864.00	14,522,627.00
Total:	\$ 79,104,492.00	\$ 19,463,191.00

c. Double Sex Change

Payments with Interest from May 1, 1978	\$ 33,908,236.00	\$ 6,950,515.00
Present Value of Future Payments	79,237,338.00	20,667,571.00
Total:	\$113,145,574.00	\$ 27,618,086.00

2. CONTRIBUTION PRORATION

For May, 1978 Entry Date and July 1, 1985 Damages Date

a. <u>Unisex</u>	(Unprorated)	Prorated
Payments with Interest from May 1, 1978	\$ 9,777,247.00	\$ 570,351.00
Present Value of Future Payments	22,402,994.00	1,716,767.00
Total:	\$ 32,180,241.00	\$ 2,287,118.00

b. Single Sex Change

Payments with Interest from May 1, 1978	\$ 23,856,628.00	\$ 1,387,979.00
Present Value of Future Payments	55,247,864.00	4,217,828.00
Total:	\$ 79,104,492.00	\$ 5,605,807.00

c. Double Sex Change

Payments with Interest from May 1, 1978	\$ 33,908,236.00	\$ 1,929,160.00
Present Value of Future Payments	79,237,338.00	5,958,429.00
Total:	\$113,145,574.00	\$ 7,887,589.00



No calculations were performed for the 1972 Entry Date Class and Plaintiffs maintain that this is the proper definition of the class to receive damages. Plaintiffs also maintain that if a proration technique is applicable it should begin on April 1, 1972 instead of May 1, 1978.

*Proration Calculations Supplemental Note:*

With respect to proration of accrued benefits the following information was obtained via computer tape from the Division of Retirement:

- Average final compensation at retirement
- Service credit at retirement
- Average final compensation at 5/78
- Salary earned by month from 5/78 to date of retirement

The following calculations were performed by Tillinghast:

- Accrued benefit at retirement was determined by multiplying average final compensation at retirement by service percentage at retirement.
- Service percentage from 5/78 to date of retirement was determined by converting the earning for each month into applicable service credit (if sufficient earnings were accrued a month of service credit at the applicable percentage was recognized).
- Service percentage at 5/78 was determined by subtracting from service percentage earned from 5/78 to retirement.

- Accrued benefit at 5/78 was determined by multiplying average final compensation at 5/78 by service percentage at 5/78.

With regard to proration contributions, the following items were input taken from the Division of Retirement data tapes:

- Account balance or reserve at date of retirement
- Earnings by month for the period 5/78 to date of retirement

The following calculations were performed by Tillinghast:

- Contributions made from 5/78 to date of retirement were determined by multiplying the applicable system rate by the earnings for each month and accumulated at the applicable valuation interest rate for that period (7% from 78-80, 8½% from 80-83)

From these above described calculations, the proration allocation formulas, as previously described were then performed, and the results of these individuals calculations are summarized in the six output listings previously labeled.

**VI-A. STATEMENT OF FACTS WHICH ALTHOUGH NOT ADMITTED, WILL NOT BE CONTESTED AT THE IMPACT HEARING**

1. The actuarial equivalency tables adopted by the FRS effective August 1, 1983 do produce an equal monthly benefit for identically situated males and females retiring on or after August 1, 1983.

## VII. STATEMENT OF THE ISSUES OF LAW ON WHICH THERE IS AGREEMENT

The parties agree that Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000e-2 *et seq.*) and the caselaw interpreting said act constitute the controlling law.

## VIII. STATEMENT OF THE ISSUES THAT REMAIN TO BE LITIGATED AT THE IMPACT HEARING

The following issues on the Plaintiffs' claim are raised by the presently pending pleadings and the Court Orders of March 16, 1984, April 25, 1984, and February 28, 1985:

1. The amount of damages to class members retiring after April 25, 1978.
2. The amount of damages to class members retiring after March 24, 1972.
3. The potential impact of a damage award.
4. Whether Plaintiff class members are entitled to future benefit payments equal to the level of benefits that similarly situated females and their joint annuitants and beneficiaries will receive in the future.

## IX. STATEMENT OF THE ISSUES OF LAW WHICH REMAIN FOR DETERMINA- TION BY THE COURT

Issues of law which remain include:

1. Whether the Defendants' conduct in failing to adhere to *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 700, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) constituted bad faith.

2. Whether Defendants are precluded from having the equitable issue of impact considered by the Court due to Defendants' bad faith by their continuing use of discriminatory actuarial tables for more than four years after the rendition of *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 700, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978).

3. Which party is required to bear the burden of proof with respect to impact.

4. The standard of proof by which impact must be shown.

5. The degree of impact which is necessary to preclude an award of damages.

6. Whether impact is to be considered with respect to the impact on the State of Florida, the nation, or whether impact is to be considered only with respect to the impact on the FRS.

7. Whether the measure of damages will be calculated by using double sex change, single sex change, unisex or proration calculations.

8. Whether Plaintiff class members are entitled to future benefit payments equal to the level of benefits that similarly situated females and their joint annuitants and beneficiaries will receive in the future.

9. If proration is found applicable, what starting date should be used.

With respect to the following three statements Plaintiffs do not believe that these are disputed issues, as this Court by Order dated February 28, 1985 and filed March

1, 1985 (Doc. 2778) has already determined that December 27, 1977 (the date Louis Samaha filed his charge with the EEOC) is the proper cut-off date for the two year statute of limitations period. Nor do the Plaintiffs believe these issues to be relevant or material to the impact hearing scheduled for February 3-4, 1986:

10. Whether the proper scope of the class in this case must be limited to those males, or their joint annuitants, which males retired no earlier than 300 days before the date of plaintiff Hughlan Long's EEOC Title VII administrative charge of discrimination filed on October 7, 1981.

11. Whether either the initial or amended EEOC Title VII administrative charge of discrimination of intervening plaintiff Carl Rassler and class member Louis Samaha are timely, so as to enable them to bring action in federal court under Title VII.

12. Whether Plaintiffs bear the burden of proving satisfaction of the conditions precedent to maintenance of a Title VII action as to anyone or more of the Plaintiffs or class members.

#### X. DISPUTED ISSUES OF FACT WHICH REMAIN FOR DETERMINATION BY THE COURT

1. Whether under the FRS plan, the amount of benefits owed to an individual retiree is calculated without any regard to contributions paid into the fund on behalf of that individual retiree or the earnings those contributions generated during the total years of service of the employee.

2. Whether, because the FRS is a defined benefit plan, and the amount of contributions paid into the fund on be-

half of an individual retiree have no causal relationship with the amount of benefits paid out to that employee, periodic legislative modifications in the contribution rate are used to keep the FRS fund in actuarial balance.

3. Whether during the years 1978-1979 the FRS investment portfolio experienced book losses of more than \$50 million dollars which loss did not jeopardize the solvency of the FRS fund and whether those losses have been recovered.

4. Whether, since 1981 FRS has experienced a 14.9% average rate of return on investments.

5. Whether in 1984 the FRS experienced an 18.2% return on investments.

6. Whether assuming an 11% return on investment, it would take less than seven years for the FRS fund to grow from its present size of approximately 9 billion dollars to approximately 15 billion dollars, exclusive of additional contributions to the fund.

7. Whether for the fiscal year ending June 30, 1979, the FRS investment portfolio experienced book losses of \$3,268,734.00 and experienced book gains in the amount of \$8,873,046.00.

8. Whether the information contained in Table 2 and found on page 5 of the Florida Retirement Systems Bulletin dated September, 1984 is true and accurate.

9. Whether twenty five base points represents a present value of between 300 million dollars and 350 million dollars in additional funds to the FRS.



10. Whether an additional 24 basis points were added to meet unexpected additions to the unfunded actuarial accrued liability.

11. For 1980 and 1983, the actuarial present value of non-vested accrued benefits as of the date of the FRS Plan valuation are as follows:

<u>Year of Valuation</u>	<u>Actuarial Present Value</u>
<u>1980</u>	
Non-vested Accrued Benefits	undetermined
<u>1983</u>	
Non-vested Accrued Benefits	\$1,195,127,000.00
(cross reference p.13, ¶ 12) [See p. A103, <i>supra</i> ]	

With respect to the following statements (12-37) Plaintiffs do not believe that these are disputed issues, as this Court by Order dated February 28, 1985 and filed March 1, 1985 (Doc. 2778) has already determined that December 27, 1977 (the date Louis Samaha filed his charge with the EEOC) is the proper cut-off date for the two year statute of limitations period. Nor do the Plaintiffs believe these issues to be relevant or material to the impact hearing scheduled for February 3-4, 1986:

12. Whether the initial EEOC Title VII administrative charges of discrimination filed by intervening plaintiff, Carl Rassler and noticed class member, Louis Samaha, failed to name or put on notice the State of Florida, Department of Administration, Division of Retirement, and whether the EEOC treated such initial charges as not putting on notice the State of Florida, Department of Administration, Division of Retirement.

13. Whether the State of Florida, Department of Administration, Division of Retirement, ever received no-

tice from the EEOC regarding Mr. Rassler's and Mr. Samaha's initial charge of discrimination.

14. Whether the first charges of discrimination filed by intervening plaintiff, Carl Rassler and noticed class member Louis Samaha which named and put on notice the State of Florida, Department of Administration, Division of Retirement, were their amended charges of discrimination filed, respectively, August 24 and August 25, 1981.

15. Whether any of the EEOC Title VII administrative charges of discrimination filed by plaintiff Hughlan Long intervening plaintiff, Carl Rassler, and noticed class member Louis Samaha named or put on notice the individual defendants, Robert Graham, Andrew McMullian, and Nevin Smith.

16. Whether class member Louis Samaha failed to receive a proper right-to-sue letter.

17. Whether Plaintiff Hughlan Long retired effective July 1, 1982, and started retirement benefits under the FRS in July, 1982.

18. Whether Plaintiff Hughlan Long elected a joint and survivorship option (Option 2) under the FRS, and receives benefits under that option.

19. Whether immediately prior to retirement, Plaintiff Hughlan Long was an employee of the Florida Department of Labor & Employment Security, an agency of the State of Florida.

20. Whether Plaintiff Hughlan Long filed his EEOC Title VII administrative charge of discrimination as to discrimination against him in the payment of retirement benefits, because of sex, on October 7, 1981.

21. Whether Plaintiff Hughlan Long's charge of discrimination named and put on notice the State of Florida, the State's Department of Administration, and the Department's Division of Retirement.

22. Whether as to the State of Florida, Department of Administration, Division of Retirement, Plaintiff Hughlan Long has satisfied all the conditions precedent for bringing a Title VII action in Federal court.

23. Whether Plaintiff Dewey Haas retired effective March 1, 1981, and started receiving retirement benefits under the FRS in June, 1981.

24. Whether Plaintiff Dewey Haas elected a joint and survivorship option (Option 3) under the FRS, and received benefits under that option.

25. Whether immediately prior to retirement, Plaintiff Dewey Haas was an employee of Metropolitan Dade County, Florida.

26. Whether Plaintiff Dewey Haas ever filed an EEOC Title VII administrative charge of discrimination as to the payment of retirement benefits to him.

27. Whether intervening Plaintiff, Carl Rassler retired effective January 1, 1979, and started receiving benefits under the FRS in February, 1979.

28. Whether intervening Plaintiff, Carl Rassler elected a joint and survivorship option (Option 2) under the FRS, and receives benefits under that option.

29. Whether prior to retirement, intervening Plaintiff Carl Rassler was an employee of the Hillsborough County School Board in Tampa, Florida.

30. Whether on May 15, 1980, intervening Plaintiff Carl Rassler filed his initial EEOC Title VII administrative charge of discrimination asserting discrimination against him, because of sex, in the payment of retirement benefits. In the section of that administrative charge asking the name of the government agency who discriminated against him, Mr. Rassler identified the Hillsborough County School Board, Tampa, Florida. The State of Florida, Department of Administration, Division of Retirement was not identified in that section.

31. Whether on August 24, 1981, pursuant to the request of the EEOC, intervening plaintiff Carl Rassler filed an amended EEOC Title VII administrative charge of discrimination therein naming, under the section asking the name of the government agency who discriminated against him, the State of Florida, Department of Administration, Division of Retirement, Tallahassee, Florida.

32. Whether noticed class member Louis Samaha retired effective February 1, 1979, and started receiving benefits under the FRS in March, 1979.

33. Whether class member Louis Samaha elected a joint and survivorship option (Option 3) under the FRS, and receives retirement benefits under that option.

34. Whether prior to retirement, class member Louis Samaha was an employee of Pinellas County Board of Public Instruction, Clearwater, Florida.

35. Whether on December 27, 1979, class member Louis Samaha filed his initial EEOC Title VII administrative charge of discrimination asserting discrimination against him, because of sex, in the payment of retirement

benefits. In the section of that administrative charge asking the name of the government agency who discriminated against him, Mr. Samaha identified Pinellas County Board of Public Instruction, Clearwater, Florida. The State of Florida, Department of Administration, Division of Retirement was not identified in that section.

36. Whether on August 25, 1981, pursuant to the request of the EEOC, class member Louis Samaha filed an amended EEOC Title VII administrative charge of discrimination therein naming under the section asking the name of the government agency who discriminated against him, the State of Florida, Department of Administration, Division of Retirement, Tallahassee, Florida.

37. Whether Florida became an EEOC recognized deferral state on September 7, 1978, to which the 300-day EEOC Title VII administrative charge of filing limit thereafter applied.

## XI. PENDING MOTIONS

The following motions are presently pending:

1. Plaintiffs' Motion for Reconsideration and Memorandum of Law filed November 4, 1985 (Doc. 2853); Defendants' Response thereto (Doc. 2858).
2. Daniel C. Brown's Motion for Leave to Withdraw as Counsel filed November 4, 1985 (Doc. 2852).
3. Plaintiffs' Motion to Strike Defendants' Proration defense filed March 26, 1985 (Doc. 2781); Defendants' Response thereto (Doc. 2785); Plaintiffs' Reply (Doc. 2787).
4. Defendants' Motion for Reconsideration of Paragraphs 8, 11 and 12 of Order of March 16, 1984 (Doc. 2713)

and for Entry of Final Summary Judgment filed January 24, 1986 (Doc. 2875).

5. Defendants' Motion to Compel Answers to their Interrogatories to Carl Rassler, filed September 13, 1985 (Doc. 2821); Plaintiff's Response (Doc. 2828); Defendants' Reply (Doc. 2835).

---

[Exhibit and Witness Lists Omitted]

[Jurat and Certificate of Service Omitted]

---



## FLORIDA STATUTE § 112.66(9) (1985)

*112.66 General provisions.*—The following general provisions relating to the operation and administration of any retirement system or plan covered by this part shall be applicable:

\* \* \* \* \*

(9) No plan shall discriminate in its benefit formula based on color, national origin, sex, or marital status. Nothing herein shall preclude a plan from actuarially adjusting benefits or offering options based on sex, age, early retirement, or disability.

*History.*—s. 1, ch. 78-170; s. 20, ch. 79-183.

---

## FLORIDA STATUTE § 121.061 (1985)

*121.061 Funding.*—

(1) Commencing December 1, 1970, all employers withholding contributions required of members under this chapter for purposes of providing retirement benefits and social security benefits to or on behalf of such members shall budget, set aside, and pay over to the administrator, for deposit into the proper retirement and social security trust funds, matching payments for retirement and social security contributions as required by this chapter.

(2)(a) Should any employer other than a state employer fail to make the retirement and social security contributions, both member and employer contributions, required by this chapter, then, upon request by the administrator, the Department of Revenue or the Department of Banking and Finance, as the case may be, shall deduct the amount owed by the employer from any funds to be distributed by it to the county, city, special district, or consolidated form of government. The amounts so deducted shall be transferred to the administrator for further distribution to the trust funds in accordance with this chapter.

(b) Should any employer for whom the city or county tax collector collects taxes, fail to make the retirement and social security contributions required by this chapter, the tax collector, at the request of the administrator and upon receipt of a certificate from the administrator showing the amount owed by the employer, shall deduct the amount so certified from any taxes collected for the employer and remit the amount to the administrator for further distribution to the trust funds in accordance with this chapter.

(c) The governing body of each county, city, special district, or consolidated form of government participating under this chapter or the administrator, acting individually or jointly, is hereby authorized to file and maintain an action in the courts of the state to require any employer to remit any retirement or social security member

contributions or employer matching payments due the retirement or social security trust funds under the provisions of this chapter.

(d) Should the income of any constitutional fee officer, in any year, be insufficient to make the matching payments required by this chapter, the board of county commissioners shall provide such fee officer sufficient funds to make these required payments when due.

(3) The appropriations provided each state agency, beginning with the 1970-1971 fiscal year and each fiscal year thereafter, shall include sufficient amounts to pay the matching contributions for social security and retirement as required by this chapter. No state agency, whether its funds are provided by state appropriations or otherwise, shall employ any person or maintain any person on its payroll unless it has allotted for such person sufficient funds to meet these required payments. Should a state agency fail to make such payments, the administrator shall report same to the Governor and certify the amount due the system trust funds to the Executive Office of the Governor. If arrangements cannot be made for the state agency to pay said amount due, then the amount due is hereby appropriated and shall be paid from the General Revenue Fund of the state.

---

# FLORIDA STATUTE § 121.071 (1985)

**121.071 Contributions.**—Contributions to the system shall be made as follows:

(1) Until January 1, 1975, regular members shall contribute each pay period at the rate of 4 percent of gross compensation and special risk members shall contribute each pay period at the rate of 8 percent of gross compensation. Effective January 1, 1975, regular members and special risk members shall make no contribution to the system.

(2) Until January 1, 1975, each employer shall contribute an amount equal to the total of its member contributions, made under subsection (1), each pay period. Effective January 1, 1975, and until October 1, 1978, each employer shall contribute 9 percent of gross compensation each pay period for each of its regular members and 13 percent of gross compensation of each pay period for each of its special risk members. Effective October 1, 1978, each employer shall contribute 9.1 percent of gross compensation each pay period for each of its regular members and 13.95 percent of gross compensation each pay period for each of its special risk members. Effective October 1, 1981, each employer shall contribute 10.93 percent of gross compensation each pay period for each of its regular members and 13.91 percent of gross compensation each pay period for each of its special risk members. Effective October 1, 1984, each employer shall contribute 12.24 percent of gross compensation each pay period for each of its regular members and 14.67 percent of gross compensation each pay period for each of its special risk members. Effective July 1, 1982, each employer shall contribute 11.14 percent of gross compensation each pay period for each of its members serving in an administrative support position in a law enforcement, firefighting, or correctional agency whose service meets the qualifications for retention of the special risk normal retirement date pursuant to the provisions of s. 121.0515(7), notwithstanding the requirement of an aggregate of 10 or more years of

special risk service. Effective October 1, 1984, each employer shall contribute 13.09 percent of gross compensation each pay period for each of its members serving in an administrative support position in a law enforcement, firefighting, or correctional agency whose service meets the qualifications for retention of the special risk normal retirement date pursuant to the provisions of s. 121.0515 (7), notwithstanding the requirement of an aggregate of 10 or more years of special risk service.

(3)(a) Effective January 1, 1975, each employer shall accomplish the increased contribution required by subsection (2) by a procedure in which no employee's gross salary shall be reduced.

(b) Upon termination of employment for any reason other than retirement, a member shall be entitled to a full refund of the contributions he has made prior or subsequent to his participation in the noncontributory plan, subject to the restrictions otherwise provided in this chapter.

(4) Contributions for social security by each member and each employer, in the amount required for social security coverage as now or hereafter provided by the federal Social Security Act, shall be in addition to contributions specified in subsections (2) and (3).

(5) Contributions made in accordance with subsections (2), (3), and (4) shall be paid by the employer into the system trust funds in accordance with rules promulgated by the administrator pursuant to chapter 120. Such contributions are due and payable no later than the 25th day of the month immediately following the month during which the payroll period ended. The division may by rule establish a different due date, which shall supersede the date specified herein; however, such due date may not be established earlier than the 20th day of the month immediately following the month during which the payroll period ended. Effective January 1, 1984, contributions made in accordance with subsection (4) shall be paid by the employer into the system trust fund in accordance with rules

promulgated by the administrator pursuant to chapter 120. For any payroll period ending any day of the month before the 16th day of the month, such contributions are due and payable no later than the 20th day of the month; and, for any payroll periods ending any day of the month after the 15th day of the month, such contributions are due and payable no later than the 5th day of the next month. Contributions received in the offices of the Division of Retirement of the Department of Administration after the prescribed date shall be considered delinquent unless, in the opinion of the division, exceptional circumstances beyond an employer's control prevented remittance by the prescribed due date notwithstanding such employer's good faith efforts to effect delivery; and, with respect to retirement contributions due under subsections (2) and (3), each employer shall be assessed a delinquent fee of 1 percent of the contributions due for each calendar month or part thereof that the contributions are delinquent. Such a waiver of the delinquency fee by the division may be granted an employer only one time each fiscal year. Delinquent social security contributions shall be assessed a delinquent fee as authorized by s. 650.05(4). The delinquent fee assessable for an employer's first delinquency after July 1, 1984, shall be as specified in s. 650.05(4), and, beginning with the second delinquency in any fiscal year by the employer subsequent to July 1, 1984, all subsequent delinquency fees shall be assessed against the employer at twice the applicable percentage rate specified in s. 650.05(4).

(6) Notwithstanding the provisions of ss. 6 and 7 of ch. 84-266, Laws of Florida, it is the intent of the Legislature that, should any other law be enacted which provides for a membership group within the Florida Retirement System a contribution rate change to take effect October 1, 1984, the respective October 1, 1984, contribution rate shall be equal to the contribution rate specified in ch. 84-266, Laws of Florida, plus the contribution rate change specified in each such other law; and, should any law be enacted which provides for a membership group within the Florida Retirement System a contribution rate change to



take effect subsequent to October 1, 1984, the respective contribution rate to be implemented on such effective date shall equal the respective contribution rate in effect on the day before the new contribution rate is to take effect plus the contribution rate change specified in such law. If a contribution rate rather than a contribution rate change is specified in any such other law, the contribution rate change for that law shall equal the difference between the September 30, 1984, contribution rate for the affected membership group and the contribution rate specified in such law.

---

# FLORIDA STATUTE § 121.091(1) (1985)

## 121.091 *Benefits payable under the system.*—

(1) **NORMAL RETIREMENT BENEFIT.**—Upon attaining his normal retirement date, the member, upon application to the administrator, shall receive a monthly benefit which shall commence on the last day of the month of retirement and be payable on the last day of each month thereafter during his lifetime. The amount of monthly benefit shall be determined as the product of A and B, subject to the adjustment of C, if applicable, when:

(a) A is 1.60 percent of his average monthly compensation, up to his normal retirement age. The first year after his normal retirement age, A is 1.63 percent of his average monthly compensation. The second year after his normal retirement age, A is 1.65 percent of his average monthly compensation. The third year after his normal retirement age, A is 1.68 percent of his average monthly compensation. A shall not exceed 1.68 percent of his average monthly compensation, except that for all creditable years of special risk service, A is 2 percent of his average monthly compensation for all creditable years prior to October 1, 1974, for which additional retirement credit has not been purchased, and 3 percent of his average monthly compensation until October 1, 1978, when all years of creditable service thereafter as a special risk member shall be worth 2 percent of his average monthly compensation; however, the normal retirement benefit, including any past or additional retirement credit, may not exceed 100 percent of the average final compensation;

(b) B is the number of his years and any fractional part of a year of creditable service earned subsequent to November 30, 1970; and

(c) C is the normal retirement benefit credit brought forward as of November 30, 1970, by a former member of an existing system. Such normal retirement benefit credit shall be determined as the product of A and B when A is the percentage of average final compensation which the

member would have been eligible to receive if he had attained his normal retirement date as of November 30, 1970, all in accordance with the existing system under which the member is covered on November 30, 1970, and B is average monthly compensation as defined in s. 121.021(25). However, any member of an existing retirement system who is eligible to retire and who does retire, become disabled, or die prior to April 15, 1971, may have his retirement benefits calculated on the basis of the best 5 of the last 10 years of service.

\*\*\*

---

# FLORIDA STATUTE § 121.091(6) (1985)

## 121.091 Benefits payable under the system.—

\*\*\*

### (6) OPTIONAL FORMS OF RETIREMENT BENEFITS AND DISABILITY RETIREMENT BENEFITS.—

(a) Prior to the receipt of his first monthly retirement payment, a member shall elect to receive the retirement benefits to which he is entitled under subsection (1), subsection (2), subsection (3), or subsection (4) in accordance with one of the following options:

1. The maximum retirement benefit payable to the member during his lifetime.

2. A decreased retirement benefit payable to the member during his lifetime and, in the event of his death within a period of 10 years after his retirement, the same monthly amount payable for the balance of such 10-year period to his beneficiary or, in case the beneficiary is deceased, in accordance with subsection (8) as though no beneficiary had been named.

3. A decreased retirement benefit payable during the joint lifetime of both the member and his joint annuitant and which, after the death of either, shall continue during the lifetime of the survivor in the same amount.

4. A decreased retirement benefit payable during the joint lifetime of the member and his joint annuitant and which, after the death of either, shall continue during the lifetime of the survivor in an amount equal to  $66\frac{2}{3}$  percent of the amount which was payable during the joint lifetime of the member and his joint annuitant.

(b) The benefit payable under any option stated above shall be the actuarial equivalent, based on tables adopted by the administrator for this purpose, of the amount to which the member was otherwise entitled.

(c) A member who elects the option in subparagraph 2. of paragraph (a) shall, in accordance with subsection (8), designate a person to receive the benefits payable in the event of his death. Such person shall be the beneficiary of the member.

(d) A member who elects the option in subparagraph 3. or subparagraph 4. of paragraph (a) shall, on a form provided for that purpose, designate his spouse or other dependent to receive the benefits which continue to be payable upon the death of the member. Such person shall be the joint annuitant of the member. After benefits have commenced under the option in subparagraph 3. or subparagraph 4., a retired member may change his designation of a joint annuitant only twice. If such a retired member desires to change his designation of a joint annuitant, he shall file with the division a notarized "change of joint annuitant" form and shall notify the former joint annuitant in writing of such change. Upon receipt of a completed change of joint annuitant form, the division shall adjust the member's monthly benefit by the application of actuarial tables and calculations developed to ensure that the benefit paid is the actuarial equivalent of the present value of the member's current benefit. The consent of a retired member's first designated joint annuitant to any such change shall not be required.

(e) The election of an option shall be null and void if either the member, designated beneficiary, or designated joint annuitant dies before benefits commence.

(f) A member who elects to receive benefits under the option in subparagraph 3. of paragraph (a) may designate one or more qualified persons, either a spouse or other dependent, as his joint annuitant to receive the benefits after his death in whatever proportion he so assigns to each person named as joint annuitant. The division shall adopt appropriate actuarial tables and calculations necessary to ensure that the benefit paid is the actuarial equivalent of the benefit to which the member is otherwise entitled under the option in subparagraph 1. of paragraph (a).

(g) Upon the death of a retired member or beneficiary receiving monthly benefits under this chapter, the monthly benefits shall be paid through the last day of the month of death and shall terminate or be adjusted, if applicable, as of that date in accordance with the optional form of benefit selected at the time of retirement.

• • • • •

---



Sections 2 & 3, Chapter 86-137 LAWS OF FLORIDA (1986)

RETIREMENT—GOVERNMENT EMPLOYEES

CHAPTER 86-137

COMMITTEE SUBSTITUTE FOR  
SENATE BILL NO. 369

\* \* \* \* \*

Additions in text are indicated by bold; deletions by italics

Section 2. Paragraphs (a), (b), (d), (e), (g), and (h) of subsection (4), of section 121.052, Florida Statutes, are amended to read:

121.052 Membership class of certain elected state officers.—

(4)(a)1. From and after October 1, 1978, and except as provided in this subsection, the employer paying the salary of a member of the Elected State Officers' Class shall withhold 8 percent of his gross salary, which shall constitute the contribution of that member with respect to retirement and other benefits payable to members of this class, and one-half of the entire contribution of the member required for social security coverage. The employer withholding such contributions shall set aside the funds necessary to pay the matching contributions required pursuant to s. 121.061 and shall contribute an amount equal to 10.57 percent of such member's gross compensation and one-half of the entire contribution with respect to the member's social security coverage.

2. From and after October 1, 1981, the employer paying the salary of any member of the Elected State Of-

ficers' Class who is a legislator shall contribute an amount equal to 19.3 percent of such member's gross compensation, which shall constitute the entire contribution with respect to such member. From and after October 1, 1984, the employer paying the salary of any member of the Elected State Officers' Class who is a legislator shall contribute an amount equal to 10.98 percent of such member's gross compensation, which shall constitute the entire contribution with respect to such member. **From and after October 1, 1986, the employer paying the salary of any member of the Elected State Officers' Class who is a legislator shall contribute an amount equal to 11.50 percent of such member's gross compensation, which shall constitute the entire contribution with respect to such member.** The employer shall, however, withhold one-half of the entire contribution of the member required for social security coverage.

(b)1. From and after October 1, 1978, the employer paying the salary of any member of the Elected State Officers' Class who is a Governor, Lieutenant Governor, Cabinet officer, Supreme Court justice, district court of appeal judge, circuit judge, county court judge, state attorney, public service commissioner, or public defender shall contribute an amount equal to 16.78 percent of such member's gross compensation and shall withhold 4 percent of such member's gross compensation, the sum of which shall constitute the entire contribution with respect to such member. The employer shall, however, withhold one-half of the entire contribution of the member required for social security coverage. Effective July 1, 1979, any member of the Elected State Officers' Class who is a public service commissioner shall be removed from this class,

shall become a regular member on that date, and shall be subject to the contribution provisions of s. 121.071 which pertain to regular members.

2. From and after October 1, 1981, the employer paying the salary of any member of the Elected State Officers' Class who is a Governor, Lieutenant Governor, or Cabinet officer shall contribute an amount equal to 21.03 percent of such member's gross compensation, which constitute the entire contribution with respect to such member. From and after October 1, 1984, the employer paying the salary of any member of the Elected State Officers' Class who is a Governor, Lieutenant Governor, or Cabinet officer shall contribute an amount equal to 10.98 percent of such member's gross compensation, which shall constitute the entire contribution with respect to such member. From and after October 1, 1986, the employer paying the salary of any member of the Elected State Officers' Class who is a Governor, Lieutenant Governor, or Cabinet officer shall contribute an amount equal to 11.50 percent of such member's gross compensation, which shall constitute the entire contribution with respect to such member. The employer shall, however, withhold one-half of the entire contribution of the member required for social security coverage.

(d) Effective October 1, 1981, the employer paying the salary of any member of the Elected State Officers' Class who is a Supreme Court justice, district court of appeal judge, circuit judge, or county court judge shall contribute an amount equal to 22.55 percent of that member's gross compensation, which shall constitute the entire contribution with respect to that member. Effective October 1, 1984, the employer paying the salary of any member of the Elected State Officers' Class who is a Supreme

Court justice, district court of appeal judge, circuit judge, or county court judge shall contribute an amount equal to 21.79 percent of that member's gross compensation, which shall constitute the entire contribution with respect to that member. Effective October 1, 1986, the employer paying the salary of any member of the Elected State Officers' Class who is a Supreme Court justice, district court of appeal judge, circuit judge, or county court judge shall contribute an amount equal to 20.94 percent of that member's gross compensation, which shall constitute the entire contribution with respect to that member. The employer shall, however, withhold one-half of the entire contribution of the member required for social security coverage.

(e) Effective October 1, 1981, the employer paying the salary of any member of the Elected State Officers' Class who is a state attorney or public defender shall contribute an amount equal to 20.95 percent of that member's gross compensation, which shall constitute the entire contribution with respect to that member. Effective October 1, 1984, the employer paying the salary of any member of the Elected State Officers' Class who is a state attorney or public defender shall contribute an amount equal to 10.98 percent of that member's gross compensation, which shall constitute the entire contribution with respect to that member. Effective October 1, 1986, the employer paying the salary of any member of the Elected State Officers' Class who is a state attorney or public defender shall contribute an amount equal to 11.50 percent of that member's gross compensation, which shall constitute the entire contribution with respect to that member. The employer shall, however, withhold one-half of the entire contribution of the member required for social security coverage.



(g) Effective July 1, 1984, the employer paying the salary of any member of the Elected State Officers' Class who is a county elected officer shall contribute an amount equal to 20.25 percent of that member's gross compensation, which shall constitute the entire contribution with respect to that member. Effective October 1, 1984, the employer paying the salary of any member of the Elected State Officers' Class who is a county elected officer shall contribute an amount equal to 16.97 percent of that member's gross compensation, which shall constitute the entire contribution with respect to that member. **Effective October 1, 1986, the employer paying the salary of any member of the Elected State Officers' Class who is a county elected officer shall contribute an amount equal to 17.19 percent of that member's gross compensation, which shall constitute the entire contribution with respect to that member.** The employer shall, however, withhold one-half of the entire contribution of the member required for social security coverage.

(h) *Notwithstanding the provisions of ss. 6 and 7 of ch. 84-266, laws of Florida, it is the intent of the legislature that, should any other law be enacted which provides for a membership group within the Florida Retirement System a contribution rate change to take effect October 1, 1984, the respective October 1, 1984, contribution rate shall be equal to the contribution rate specified in ch. 84-266, Laws of Florida, plus the contribution rate change specified in each such other law, and, should any law be enacted which provides for a membership group within the Florida Retirement System a contribution rate change to take effect subsequent to October 1, 1984, the respective contribution rate to be implemented on such effective date shall equal the respective contribution rate*

*in effect on the day before the new contribution rate is to take effect plus the contribution rate change specified in such law. If a contribution rate rather than a contribution rate change is specified in any such other law, the contribution rate change for that law shall equal the difference between the September 30, 1984, contribution rate for the affected membership group and the contribution rate specified in such law.*

Section 3. Subsections (2) and (6) of section 121.071, Florida Statutes, are amended to read:

121.071 Contributions.—Contributions to the system shall be made as follows:

(2) Until January 1, 1975, each employer shall contribute an amount equal to the total of its member contributions, made under subsection (1), each pay period. Effective January 1, 1975, and until October 1, 1978, each employer shall contribute 9 percent of gross compensation each pay period for each of its regular members and 13 percent of gross compensation each pay period for each of its special risk members. Effective October 1, 1978, each employer shall contribute 9.1 percent of gross compensation each pay period for each of its regular members and 13.95 percent of gross compensation each pay period for each of its special risk members. Effective October 1, 1981, each employer shall contribute 10.93 percent of gross compensation each pay period for each of its regular members and 13.91 percent of gross compensation each pay period for each of its special risk members. Effective October 1, 1984, each employer shall contribute 12.24 percent of gross compensation each pay period for each of its regular members and 14.67 percent of gross compen-



sation each pay period for each of its special risk members. **Effective October 1, 1986, each member shall contribute 13.14 percent of gross compensation each pay period for each of its regular members and 15.11 percent of gross compensation each pay period for each of its special risk members.** Effective July 1, 1982, each employer shall contribute 11.14 percent of gross compensation each pay period for each of its members serving in an administrative support position in a law enforcement, firefighting, or correctional agency **as provided in whose service meets the qualifications for retention of the special risk normal retirement date pursuant to the provisions of s. 121.0515(7), notwithstanding the requirement of an aggregate of 10 or more years of special risk service.** Effective October 1, 1984, each employer shall contribute 13.09 percent of gross compensation each pay period for each of its members serving in an administrative support position in a law enforcement, firefighting, or correctional agency **as provided in whose service meets the qualifications for retention of the special risk normal retirement date pursuant to the provisions of s. 121.0515(7), notwithstanding the requirement of an aggregate of 10 or more years of special risk service.** **Effective October 1, 1986, each employer shall contribute 15.44 percent of gross compensation each pay period for each of its members serving in an administrative support position in a law enforcement, firefighting, or correctional agency as provided in s. 121.0515(7).**

(6) *Notwithstanding the provisions of ss. 6 and 7 of ch. 84-266, Laws of Florida, it is the intent of the Legislature that, should any other law be enacted which provides for a membership group within the Florida Retirement System a contribution rate change to take effect*

*October 1, 1984, the respective October 1, 1984, contribution rate shall be equal to the contribution rate specified in ch. 84-266, Laws of Florida, plus the contribution rate change specified in each such other law, and should any law be enacted which provides for a membership group within the Florida Retirement System a contribution rate change to take effect subsequent to October 1, 1984, the respective contribution rate to be implemented on such effective date shall equal the respective contribution rate in effect on the day before the new contribution rate is to take effect plus the contribution rate change specified in such law. If a contribution rate rather than a contribution rate change is specified in any such other law, the contribution rate change for that law shall equal the difference between the September 30, 1984, contribution rate for the affected membership group and the contribution rate specified in such law.*

... ..

---

# **OPPOSITION BRIEF**

86 1685

Supreme Court, U.S.

FILED

APR 30 1987

JOSEPH F. SPANIER, JR.  
CLERK

No. 86-

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986

---

STATE OF FLORIDA, et al,  
Petitioners,

v.

HUGHLAN LONG, et al, etc.,  
Respondents

---

RESPONSE OF RESPONDENT  
DAVID V. KERNS PRO SE IN  
SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI

---

David V. Kerns, pro se  
418 Vinnedge Ride  
Tallahassee, Fla. 32303  
(904) 385-1366  
Respondent.

10 p/2



ALTERNATIVE STATEMENT OF  
QUESTION PRESENTED FOR REVIEW

Having present evidence more than adequate to support the finding, did the district court and the 11th Circuit err in failing to find that the Florida Retirement System (F. R. S. herein) administrators, actuaries and attorneys reasonably could have assumed during the 1978 to mid-1983 period and on the basis of Manhart alone that it was not unlawful to provide optional annuities that reflected plans available on the open market?

PARTIES TO THE PROCEEDING

Petitioners herein are the State of Florida, Bob Martinez as Governor, Adis Maria Vila as Secretary of Administration and Andrew J. McMullian III as Director of the Division of Retirement, Department of Administration; they were appellants/cross appellees in the 11th Circuit and defendants in the trial court (U. S. District Court for the Northern District of Florida, Tallahassee Division).

Respondents in this Court include the named plaintiffs Hughlan Long, S. Dewey Haas and Carl Rassler and members of a noticed class known as "subclass 'A'" or their surviving joint annuitants or beneficiaries; they were appellees/cross appellants in the 11th Circuit and plaintiffs in the trial court.

David V. Kerns, pro se, is referred to herein as "this respondent". He is an

unnamed noticed member of subclass "A" by virtue of his retirement on June 30, 1982 and his election of F. R. S. Option 3. Prior to that date he was general counsel of the Department of Administration and as such the legal advisor to the Secretary of Administration.

Judson Freeman is also an unnamed noticed member of subclass "A" appearing on his own behalf.

TABLE OF CONTENTS

ALTERNATIVE STATEMENT OF	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
REASONS FOR GRANTING THE WRIT	1
1. The basic time period	1
2. Three reasonable legal bases	
for the State's position	
during such period	6
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page
<u>Arizona Governing Committee for</u> <u>Tax Deferred Annuity &amp; Deferred</u> <u>Compensation Plans v. Norris, 463</u> <u>U. S. 1073 (1983) ("Norris")</u>	1
<u>City of Los Angeles, Dep't of</u> <u>Water &amp; Power v. Manhart, 435</u> <u>U.S. 702 (1978) ("Manhart")</u>	1
<u>Probe v. State Teachers Retirement</u> <u>System, 780 F.2d 776 (9th Cir.),</u> <u>cert. denied U.S. , 90 L.Ed.2d</u> <u>978 (1986) ("Probe")</u>	5



This respondent, appearing pro se, submits this response in support of Petitioner's Petition for Writ of Certiorari, in respect to and addressing solely the issue of "notice".

REASONS FOR GRANTING THE WRIT

1. The Basic Time Period for Consideration Herein:

City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U. S. 702

(1978)(herein Manhart) was decided in 1978; the district court felt the date for reasonable compliance should be October 1, 1978. Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U. S. 1073 (1983) (herein Norris) was decided in 1983 and the Florida Retirement System (F. R. S.) was amended in conformity therewith effective August 1, 1983. The time period

crucial to this case is that between these two decisions, or more specifically, October 1, 1978 to August 1, 1983.

During the period just stated, the State's administrators, advisors and attorneys had only Manhart for guidance. Norris was not available, nor any of the subsequent clarification that now colors a person's thinking. So when considering whether the State could reasonably have assumed during this period that it was not unlawful to continue to use gender-based tables when allowing a retiree to elect a two-life option in exchange for the retiree's basic one-life benefit, one must place oneself in the context of Manhart alone. The comments in this response are addressed solely to the situation existing during the time period stated above and in the Alternative Statement of the Question

Presented for Review.

An evidentiary hearing was held in this case in the district court on February 3, 4, 5, and 10, 1984. The testimony and exhibits submitted there explained in detail the reasoning behind the State's position and the efforts made by various persons - administrators, actuarial consultants and attorneys - to determine the proper course of action to be taken in response to the Manhart opinion. Division Director McMullian told of the various difficulties facing him in making change in a system as massive as the F. R. S., which serves over 1,000 governmental entities - counties, school districts, cities, and various types of special districts, as well as state government - and has over 400,000 members. He explained that in the absence of a legislative change in the contribution

rate paid by the governmental employers, a move to unisex tables would have entailed a reduction in the benefits paid to female members. The system's actuarial consultant told of his contacts with other actuaries nationwide and of his trip to interview the administrators and attorneys involved in the Manhart case.

Among other witnesses, this respondent testified as to his advice to the Secretary of Administration to await judicial or legislative clarification. Although the evidence may be examined in some detail when the writ is granted, suffice it for now to conclude that it was sufficient to support a finding by the district court that the F. R. S. personnel did not ignore Manhart but diligently sought the reasonable course to follow in the light of that decision alone. On the basis of such evidence, the district court

and the 11th Circuit could have decided to follow the decision of the Ninth Circuit in Probe v. State Teachers' Retirement System, 780 F.2d 776 (9th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 90 L.Ed. 978 (1986) (herein Probe). In that decision the Ninth Circuit said:

While Manhart put all employer-operated pension funds on notice that they could not require men and women to make unequal contributions to the fund, it expressly held that an employer could set aside equal contributions and let each retiree purchase whatever benefit is available on the "open market." 435 U.S. at 717-18, 98 S.Ct. at 1380. Thus, STRS reasonably could have assumed that it was lawful to provide an optional annuity system that reflected plans offered by insurance companies on the open market. . . 780 F.2d 776 at p. 782-783.



Instead of following Probe, both the district court and the 11th Circuit determined to reject that decision and to declare it bad law. That error should be corrected here.

2. Were there reasonable legal bases for the F. R. S. position during the period in question?

a. One of the considerations voiced by Division Director McMullian was his reluctance to reduce the benefits for females a switch to unisex tables would require. A similar consideration was noted in this respondent's letter dated September 14, 1983, replying to an inquiry from the named-plaintiffs' attorney (R5-2678-8; see also Defendant's Exhibit 15). That comment was that no final decision had ever been entered in favor of a member of an advantaged group and against the interests of the members of a

disadvantaged group. The district court's reaction to this view was:

"\* \* \* Discrimination is no less abhorrent when it works in favor of a traditionally disadvantaged group." (Petr. Appx.p. A62)

Contrary to the district court's view, this Court has held in regard to affirmative action policies, some technical discrimination may be permissible in certain circumstances. Similarly, an employer may take actions that achieve the purposes of Title VII and that extend rather than limit the principles and objectives of that statute.

b. It is basic that any appellate opinion is evaluated on the basis of the facts involved. Manhart involved the pay-in stage; in order to find it applicable to F. R. S., one had first to

find the holding applicable to the pay-out of the gender-blind basic benefit, and then reach beyond to the retiree's election of an actuarially-equivalent option. To persons habitually involved in retirement matters, these were large steps. As expressed by this respondent in his September 14, 1983 letter and later in his district court testimony, the purchase of an elective option by a retiring employee occurs after the termination of the essential elements of the employer-employee relationship, to which Congress addressed Title VII. Further, because the retiree's decision to trade in his or her one-life benefit for one of several benefits extending over the span of two lives involves the consideration of factors indigenous to the purchase of an insurance annuity (such as, how long will he or she live, how long will his or her

spouse live, what income will they have, and what will their needs be at various times in their future lives), it could well be held that the purposes and objectives of Title VII did not extend to this extreme. Certainly there was no evidence of any intent of Congress that Title VII should be applied so extensively.

(c) To one seeking to determine the extent of the application of Manhart on the basis of that decision alone, the clarion caveat contained in that opinion (now referred to as the "open-market exception") had a far different meaning than was given it by the district court or the 11th Circuit. Far from appearing to apply only to third persons, it clearly implied that it was applicable to the purchase of actuarially-equivalent options. If the exception was meant to apply only

to third persons, it would have been simple to state that Manhart did not apply to situations not involving Title VII and the employer-employee relationship. Instead, the provision stated that when an employer set aside equal contributions (or, in the case of F. R. S., equal benefits), nothing in the Manhart holding "implies" that it would be unlawful to "let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." Notice the term retiree, not employee. Note that the language is not "purchase in the open market" but instead the employer may "let" the retiree purchase the largest benefit which . . . contributions could (not would) command in the open market. The largest benefit the contributions could command clearly implies an actuarial equivalent (since

under the F. R. S. formula, a female can always purchase a larger benefit under a gender table than under a unisex table) and the employer letting the retiree purchase clearly implies an elective option. Furthermore, the "his or her" clearly implies a distinction based on sex, because the largest benefit a person of one gender may purchase is usually different from the largest benefit a person of the opposite gender could purchase. Hence the so-called "open-market exception" lent strong credence to the view that Manhart did not extend to the employer's elective options.

Thus it has been demonstrated that, in the pre-Norris period with which we are solely concerned here, there was valid and reasonable basis for assuming that Title VII might be held not to preclude the use of gender-based tables in formulas for the



calculation of elective options such as those in use in F. R. S. That in the light of subsequent decisions, the advice may have proven to have been in error, is immaterial. What is important is that, for the sake of the stability of the law if for no other reason, the district court and the 11th Circuit, with no reason for the distinction being made in fact or law, should not have rejected the holding of the Ninth Circuit in Probe as set forth above.

#### CONCLUSION

For the reasons stated, this respondent respectfully prays that this Court grant Petitioner's Petition for Writ of Certiorari to the extent of correcting the finding that, prior to the time the Manhart decision received judicial clarification by Norris, the State reasonably could not have assumed it was

not unlawful to continue to use its gender based tables for elective options and to the extent of directing that the decisions in this case below be so revised as to be consistent with that of Probe, cited above.

Respectfully submitted,

  
David V. Kerns, pro se,

Respondent

418 Vinnedge Ride

Tallahassee, Fla. 32303

(904) 385-1366

# **OPPOSITION BRIEF**

MAY 28 1987

NO. 86-1685

JOSEPH F. SPANIOLO, JR.  
CLERK

in the **Supreme Court**  
of the **United States**

October Term, 1986

THE STATE OF FLORIDA, et al.,  
*Petitioners,*

vs.

HUGHLAN LONG, S. DEWEY HAAS and CARL  
RASSLER, individually and on behalf of all retired and  
present male employees subject to the Florida Retirement  
System established by Chapter 121, Florida Statutes, as  
well as the surviving joint annuitants of any deceased  
retired male employees,

*Respondents.*

**RESPONDENTS' BRIEF IN OPPOSITION TO  
THE PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

WOODROW M. MELVIN, JR.

*Counsel of Record*

KEITH OLIN

CINDY NIAD-HANNAH

RUDEN, BARNETT, McCLOSKEY, SMITH,

SCHUSTER &amp; RUSSELL, P.A.

One Biscayne Tower—Suite 2020

Miami, Florida 33131

(305) 371-6362

©

JEROLD FEUER

19 W. Flagler Street

Miami, Florida 33130

DAVID POPPER

7700 N. Kendall Drive—Suite 710

Miami, Florida 33156

*Attorneys for Respondents*

3514



## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT .....	4
ARGUMENT .....	9
I. BECAUSE THIS PENSION FUND IS OPERATED DIRECTLY BY THE EMPLOYER, THIS COURT'S 1978 DECISION IN <i>MANHART</i> GOVERNS, NOT SUBSEQUENT DECISIONS SUCH AS <i>NORRIS</i> IN 1983; NO CONFLICT HAS BEEN SHOWN BY PETITIONERS .....	9

## TABLE OF CONTENTS—(Continued)

	Page
II. THE ELEVENTH CIRCUIT PROPERLY APPLIED THE "CONTINUING VIOLATION" PRINCIPLE IN ACCORDANCE WITH ESTABLISHED SUPREME COURT AND CIRCUIT COURT CASE LAW .	20
III. THE DETERMINATION THAT CLASS REPRESENTATIVE HUGHLAN LONG'S TITLE VII CLAIM IS NOT BARRED BY RES JUDICATA OR COLLATERAL ESTOPPEL IS CONSISTENT WITH <i>KREMER</i> AND ITS PROGENY .....	25
CONCLUSION .....	28

## TABLE OF AUTHORITIES

Cases	Page
<i>Allen v. United States Steel Corp.</i> , 665 F.2d 689 (5th Cir. 1982) .....	22
<i>Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris</i> , 463 U.S. 1073 (1983) .....	passim
<i>Bazemore v. Friday</i> , ___ U.S. ___, 106, S.Ct. 3000 (1986) ....	7, 23
<i>Burney v. Polk Community College</i> , 728 F.2d 1374 (11th Cir. 1984) .....	27
<i>City of Los Angeles Department of Water and Power v. Manhart</i> , 435 U.S. 702 (1978) .....	passim
<i>EEOC v. Texas Industries, Inc.</i> , 782 F.2d 547 (5th Cir. 1984) .....	18
<i>Gonzalez v. Firestone Tire &amp; Rubber Co.</i> , 610 F.2d 241 (5th Cir. 1980) .....	22
<i>Gordon v. Gordon</i> , 59 So.2d 40 (Fla. 1952) .....	26
<i>Hirst v. State of California</i> , 770 F.2d 776 (9th Cir. 1985) .....	26

## TABLE OF AUTHORITIES—(Continued)

Cases	Page
<i>Kremer v. Chemical Construction Corp.</i> , 456 U.S. 461 (1982) .....	25, 26, 27
<i>Long v. Department of Administration, Division of Retirement</i> , 428 So.2d 688 (Fla. 1st DCA 1983) .....	25, 26
<i>Marrese v. American Academy of Orthopedic Surgeons</i> , 470 U.S. 323 (1985) .....	25
<i>Perez v. Laredo Junior College</i> , 706 F.2d 731 (5th Cir. 1983) .....	22, 24
<i>Probe v. State Teachers' Retirement System</i> , 780 F.2d 776 (9th Cir. 1986) cert. denied — U.S. —, 106 S.Ct. 2891 (1986) ....	passim
<i>Retired Public Employees' Association of California v. State of California</i> , 799 F.2d 511 (9th Cir. 1982) .....	6, 14
<i>Roberts v. North American Rockwell Corp.</i> , 650 F.2d 823 (6th Cir. 1981) .....	22
<i>Spirt v. Teachers Insurance and Annuity Association</i> , 691 F.2d 1054 (2d Cir. 1982), vacated for further consideration in light of <i>Norris</i> , 463 U.S. 1223 (1983) .....	19

## TABLE OF AUTHORITIES—(Continued)

Cases	Page
<i>Spirt v. Teachers Insurance and Annuity Association</i> , 735 F.2d 23 (2d Cir. 1984) cert. denied 464 U.S. 881 (1984) .....	14, 19, 20
<i>Stewart v. CPC International, Inc.</i> , 679 F.2d 117 (7th Cir. 1982) .....	22
<i>United Air Lines Inc. v. Evans</i> , 431 U.S. 553 (1977) .....	7, 17, 21
<i>Washington v. Davis</i> , 426 U.S. 229 (1976) .....	27
<b>Statutes</b>	
Title VII .....	passim
42 U.S.C. §2000e-5(e) .....	8, 20



## STATEMENT OF THE CASE

This case, by virtue of its facts, is unique. In certain respects, these unique facts are fatal to the employer's various theories to escape legal liability. For that reason, the employer has chosen to present here a statement of the case which is false in several respects. It purports to introduce and rely upon alleged facts which did not even occur until *after* the trial, and which therefore were not part of the record before the trial court (and, of course, were never subject to discovery or cross examination). Also, it states as fact certain matters which the trial court and the Eleventh Circuit expressly found to be otherwise, yet the Petition does not challenge the factual findings by the courts below as clearly erroneous. It mischaracterizes the record below and the evidence taken by the court.

The most egregious impropriety is the employer's statement at page 10 of its Petition that ". . . nowhere did the district court find" that the 1984 Legislature created "a surplus in the fund of over \$200 million." This is simply false. The district court expressly determined that about \$216 million had been created in "excess cash." (A. 68).<sup>1</sup> It said:

Defendants have offered Mr. Tierney and his firm as experts. If the court accepts the expert's opinion as of 1984, then the 25 base points represent 24 more than needed to fund the FRS on an actuarially sound basis. The defendants

---

<sup>1</sup>The Reference to "(A.)" refers to Petitioners' Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

were adamant in denying that this increase created a "slush fund," and this court in no way wishes to intimate an evil intent or motive in approving the increase. But the fact remains that there was an increase 24 base points over what defendants' expert considered necessary. The court appreciates that the contribution increase did not create a lump sum. However, the continued collection through contributions 24 bases points<sup>2</sup> over and above what defendants' own experts have testified would be needed to keep the fund in actuarial balance would *necessarily* generate excess cash in the fund. (emphasis by the Court). (A. 67-68).

In affirming the district court, the Eleventh Circuit referred to these monies as "surplus" cash. (A. 20). Nothing could be more plainly false than the Petitioners' statement of "fact" about the non-existence of this \$200 million, whether you call it "surplus" or "excess". This mistatement is so offensive to proper practice before a court of the United States and so material to the legal issues presented here by the Petitioners as to warrant, perhaps require, a summary dismissal or denial of the petition with all costs, including counsel fees, to be taxed against the Petitioners.

Moreover, because the employer does not challenge the trial court's various factual findings in any regard,

---

<sup>2</sup>The value of one base point is approximately \$9 million; (i.e.) 24 base points times \$9 million equals \$216 million. (A.56).

it is totally improper to cite to evidence in derogation of these findings. This certiorari proceeding does not provide a forum for the employer to re-try its case de novo.

"Reasoning" from its central and, as just demonstrated, entirely false premise that the fund has no provision for some \$216 million in "surplus" or "excess" cash, this employer falsely states that "there is no dispute that the award in this case would be paid. . . through increased contribution rates." (Petition at p. 8). The findings below established and affirmed that the contribution rates were already increased in 1984 to provide a "surplus" or "excess" of more than \$216 million and, here, the petitioner does not contend that these factual conclusions are "clearly erroneous." Petitioner simply ignores them.

At page 11 of the Petition, the employer attempts to obliterate the distinction between a defined contribution plan and a defined benefit plan, stating the only difference is that in a defined benefit plan the amount of the benefit promised when factored against life expectancy determines the amount of the contribution required in order to fund the pension plan. In other words, the benefits promised determines the level of contribution needed for a sound system. In a defined contribution plan, however, the level of the contributions accrued determines the amount of the benefit to which the pensioner is entitled. In other words, the value of the contributions made (plus interest accumulations) determines the level of benefits that are promised. While this is an accurate statement, it renders false the employer's next statement that in the FRS plan "there is a direct connection between contributions and

benefits just as in a defined contribution plan." (Petition at p. 11). Logically, both statements cannot be true. Moreover, the trial court expressly concluded that under the FRS defined benefit plan there is *no direct linkage* between the amount of total contributions accrued to date in the fund as a whole and the benefits promised to the pensioners. Hence, it was decided and affirmed by the Eleventh Circuit that the employer's "proration" argument presented no equitable basis for reducing recovery below the level of benefit defined by the plan, (i.e.) five (5) years average final compensation factored against life expectancy. (A. 22, 65-66)

Having thus re-written the facts and conclusions by the courts below to suit themselves, this employer predicates its several complex theories of innocence upon them and weaves a disingenuous and illogical path beyond *Manhart* to *Norris* and on to *Probe* and *Spirt II*, and then to "proration" and so on.

### SUMMARY OF THE ARGUMENT

The award of relief to the Plaintiff class is in complete accordance with this Court's decisions in *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978) and in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983) and does not conflict with the decisions of any other Circuit Court of Appeals. *Manhart* established that Title VII did not permit the use of sex based mortality tables in an employer operated pension plan. However, the *Manhart* Court declined to award retroactive relief in that case due to equitable considerations, reasoning that pension plan administrators could reasonably have

believed it was lawful to use these actuarially accepted tables and expressing concern that a new and unforeseeable interpretation of law would have a devastating impact which could bankrupt pension plans.

In *Norris*, this Court dealt solely with a limited issue left open in *Manhart* which appeared to suggest that an employer whose pension plan was administered by an independent third party such as an insurance company which offered the same sex based benefits available on the "open market" would not violate Title VII. While *Norris* held that this practice still did violate Title VII, the Court again found it was inequitable to award relief because reasonable pension administrators could have believed the practice acceptable under the *Manhart* "open market" language. The Court also felt that under these circumstances its ruling was again unforeseeable and could cause a devastating impact on the pension plan at issue.

Because the pension plan in this case has always been operated by the employer and never by any independent third party administrator, it is plainly controlled by *Manhart*. The narrow "open market" question resolved in *Norris* is entirely irrelevant to this employer and this plan. Thus, the district court correctly determined that this employer was on notice by the 1978 *Manhart* decision that its pension plan violated Title VII. In fact, this was expressly acknowledged by the employer in various internal memoranda and correspondence from 1978 through 1981. Yet Petitioners never discontinued the practice. For these reasons, the equitable considerations in *Norris* do not preclude but rather, by negative implication require an award of back



pay and retroactive relief in this case. As of the 1978 *Manhart* decision, liability was both foreseeable and foreseen by this employer. Moreover, the district court expressly found that this pension plan has "excess cash" of approximately \$216 million so that there is no impact on the fund as the result of the damages awarded in this case.

For these reasons, neither *Probe v. State Teachers' Retirement System*, 780 F.2d 776 (9th Cir. 1986) cert. denied \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 2891 (1986) nor *Retired Public Employees Association of California v. State of California*, 799 F.2d 511 (9th Cir. 1986) conflict with the Eleventh Circuit's decision in this case. In both of those cases the Ninth Circuit held that plan administrators were not on notice of their plans' illegality until the 1983 *Norris* decision and thus should not be liable for backpay damages. In this case however, the trial court found, with ample support in the evidence from this employer's internal memoranda, that FRS administrators recognized *Manhart* required discontinuance of sex based mortality tables and the likelihood of backpay damages for its failure to do so. Thus, *Probe* and *Retired Public Employees* are factually distinct and do not conflict with the decision in this case. In any event, *Probe* and *Retired Public Employees* fundamentally misinterpret *Norris* by failing to recognize that the only unanticipated rule of law announced in *Norris* was that the *Manhart* open market language does not permit employee pension plans administered by third parties to utilize sex based mortality tables.

Similarly, the decision to award relief in this case also does not conflict with *Spirit v. Teachers Insurance and Annuity Association*, 735 F.2d 23 (2nd Cir. 1984) cert. denied 464 U.S. 881 (1984). Although the Second Circuit denied damages in that case based on *Norris*, the plan at issue in that case, like the plan at issue in *Norris*, was administered by independent third parties rather than by the employer. Thus, the Second Circuit's decision is also factually distinct and for that reason does not conflict with this case.

The Eleventh Circuit also correctly rejected Petitioners' proration argument because this is a defined benefit rather than defined contribution plan. As the district court found, there is no direct correlation between contributions and benefits in a defined benefit plan. Quite simply, proration is thus factually inapplicable. Moreover, Petitioners have not demonstrated conflict with any other court decision nor that the district judge abused his discretion in fashioning relief.

The circuit court below correctly applied the continuing discrimination principle as developed in *United Airlines Inc. v. Evans*, 431 U.S. 553 (1977) and a host of circuit court decisions. This is not the situation where despite the effect of a prior discrimination, class members are currently treated the same as identically situated female retirees. Each month class members receive a smaller pension check than their female counterparts. Thus, each month's discriminatory benefit check is a new and independent Title VII violation. The decision below is also in accordance with *Bazemore v. Friday*, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 3000 (1986). Because this practice constitutes a continuing violation of Title

VII, the EEOC charges filed by Class Representative Rassler as well as class member Samaha were timely and proper under 42 U.S.C. §2000e-5(e) so that Mr. Rassler is a proper class representative who exhausted all administrative requirements. Moreover, it was entirely correct for the class to include all persons who received a discriminatory benefit check within the 300 day period proceeding those filings.

Finally, there is no merit to the contention that Class Representative Hughlan Long's Title VII claim is precluded by res judicata or collateral estoppel pursuant to *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) and its progeny. Because Mr. Long never had a Title VII claim or a claim under a Florida law equivalent to Title VII resolved on the merits in earlier state proceedings, those proceedings have no res judicata or collateral estoppel effect on his present Title VII action. Accordingly, there is no conflict with *Kremer* or its progeny and Mr. Long also remains a proper class representative who has exhausted all administrative requirements. For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

## ARGUMENT

### I.

**BECAUSE THIS PENSION FUND IS OPERATED DIRECTLY BY THE EMPLOYER, THIS COURT'S 1978 DECISION IN *MANHART* GOVERNS, NOT SUBSEQUENT DECISIONS SUCH AS *NORRIS* IN 1983; NO CONFLICT HAS BEEN SHOWN BY PETITIONERS**

This employer does not deny that it directly operates a pension fund which pays smaller monthly retirement benefits to men than to women due to use of sex based mortality tables constituting illegal sex discrimination under Title VII. Therefore, the employer's liability in this case flows directly and exclusively from this Court's decision in *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978) and not the subsequent decision in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983). *Manhart* established that Title VII did not permit the use of sex based mortality tables in an employer-operated pension plan. *Manhart* held that although the different life expectancies for males and females might be an actuarially accepted fact,<sup>1</sup> it could not be said that this sexual stereotype was true for every individual; i.e. some men outlive some women. Title VII focused on the

<sup>1</sup>Recent scientific evidence now questions whether sex or the lifestyle associated therewith is the true cause of longevity, i.e., work stress, smoking, alcohol, etc. *Manhart*, 435 U.S. at 710.

individual and precluded the use of these stereotypes, even if generally true for the sexes as a whole. 435 U.S. at 705-06.

In holding that the employer's use of such tables was an illegal employment practice under Title VII, this court explained that:

*It is equally true, however, that all individuals in the respective classes do not share the characteristic that differentiates the average class representatives. Many women do not live as long as the average man and many men outlive the average woman. The question, therefore, is whether the existence or nonexistence of "discrimination" is to be determined by comparison of class characteristics or individual characteristics. A "stereotyped" answer to that question may not be the same as the answer that the language and purpose of the statute command.*

The statute makes it unlawful "to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. §2000e-2(a)(1) (emphasis added). *The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.*

435 U.S. at 706 (Emphasis added).

In rendering the *Manhart* decision this Court emphasized that its ruling applied only in the employment context stating:

Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her contributions could command on the open market.

435 U.S. at 717-18. In a footnote to this statement, this Court recognized that "Title VII and the Equal Pay Act primarily govern relations between employees and their employer, not between employees and third parties." 435 U.S. at 718 n. 33. This "open market" exception is noted because, as discussed, *infra*, it went on to acquire greater significance in later case law than was probably originally intended or contemplated.

Not surprisingly, the employer now attempts to minimize the significance of the *Manhart* decision, describing the result at the most superficial levels. At trial, however, it was proven that FRS administrators long ago recognized, or at least, suspected that their sex-based tables were illegal.

Following the April 25, 1978 *Manhart* decision, Lawrence J. Gibney, the State Retirement Actuary, wrote in a May 19, 1978 memorandum to the then-State Retirement Director Robert L. Kennedy:

In light of the recent Supreme Court decision, it is not a question of 'if' but 'when' we adopt such [unisex] factors.



(RA. 1-2).<sup>4</sup> The reference is obviously to *Manhart* as Mr. Gibney admitted at trial. In a memorandum dated May 21, 1981, Mr. Gibney again stated:

If we were forced by a court order to a 'unisex' tables, its conceivable we would have to make adjustments back to the date of the *Manhart* case which occurred in September [sic April] 1978. (RA. 8).

Others in the FRS also unequivocally recognized that they were subject to *Manhart*. In a July 10, 1981 memorandum from Staff Attorney Diane K. Kiesling to current State Retirement Director Andrew J. McMullian, Ms. Kiesling stated:

The reasons for the Supreme Court's denial of retroactive relief in *Manhart* no longer exists and I suspect retroactivity is going to start showing up in these types of cases in the future. . . . (RA. 15).

Also most compelling is a September 1, 1981 memorandum from Staff Attorney Samantha Boge to General Counsel David Kerns which stated:

Using sex-distinct actuarial tables resulting in higher monthly benefits for female retirees and their families than male retirees violates Title

<sup>4</sup>The reference to "(RA.\_\_\_\_)" refers to the Respondents' Appendix to Respondents' Brief in Opposition to the Petition for Writ of Certiorari.

VII in my opinion as surely as unequal monthly employee contributions. *While such use may be permissible by insurers generally, it is not permissible by employers like the State of Florida.* (RA. 17). (Emphasis added).

It is nonsense for this employer to now claim that it was not on notice of the FRS' illegality until the 1983 *Norris* decision. These hard, unequivocal and irrefutable admissions totally contradict this belated claim of innocent ignorance.

The 1983 *Norris* decision dealt *only* with the "open market" question from *Manhart*. Because the Florida plan was employer administered, and never had any involvement by a third party insurer, the rule of law eventually announced in *Norris* is completely inapplicable in this case and provides no authority for the denial of back pay or retroactive damages. As recognized in *Manhart* and *Norris*, relief may be denied in a Title VII pension case only where a new and unanticipated rule of law creates an unexpected and devastating impact upon a pension plan which would jeopardize its solvency and harm innocent third parties. 435 U.S. 720-723; 463 U.S. 1092. Here, no new or unanticipated rule of law was announced. *Manhart* clearly controlled. No "unexpected" impact was created. The employer had been warned before. According to the findings of the trial court, no devastating impact exists, even at a \$201 million backpay award. No harm can therefore befall any innocent third parties.

Moreover, *Norris* does not flatly preclude retroactive relief in all Title VII pension cases as the employer suggests and, to the extent the employer relies upon the

decisions in *Probe v. State Teachers Retirement System*, 780 F.2d 776 (9th Cir. 1986) *cert. denied*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2891 (1986); *Retired Public Employees' Association of California v. California*, 799 F.2d 511 (9th Cir. 1982); and *Spirt v. Teachers Insurance and Annuity Association*, 735 F.2d 23 (2d Cir. 1984) *cert. denied*, 469 U.S. 881 (1984) ("*Spirt II*"), for that proposition, such reliance is misplaced.

Having determined that the Arizona plan "*plainly* would have violated Title VII" if it had been run by the employer itself, 435 U.S. at 1086 (Emphasis added), the liability majority in *Norris* further held that the employer did not avoid Title VII liability by having the plan administered by an independent third party insurance company. However, the damages majority held that it was inappropriate to award relief because the employer could reasonably have believed the *Manhart* "open market" exception permitted use of sex based mortality tables where the plan was administered not by the employer itself but by a third party:

*Manhart* did put all employer-operated pension funds on notice that they could not "requir[e] that men and women make unequal contributions to [the] fund," *id.*, at 717, 98 S.Ct., at 1380, but it expressly confirmed that an employer could set aside equal contributions and let each retiree purchase whatever benefit his or her contributions could command on the "open market," *id.*, at 718, 98 S.Ct., at 1380. Given this explicit limitation, an employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market.

463 U.S. at 1106 (Emphasis added). Similarly, Justice O'Connor, concurring with this portion of the damages majority opinion wrote:

I see no reason to believe that a retroactive holding is necessary to ensure that pension plan administrators, *who may have thought until our decision today that Title VII did not extend to plans involving third-party insurers*, will not now quickly conform their plans to insure that individual employees are allowed equal monthly benefits regardless of sex.

463 U.S. 1110 (Emphasis added).

Thus, contrary to the employer's contentions, *Norris* does not flatly prohibit the award of monetary relief to pre-August 1, 1983 retirees. *Norris* does not apply to the Florida plan because Florida's plan was *never* administered by anyone other than this employer itself. (A. 39). The *Norris* result applies only to employers whose plans were administered by third parties. It is only in these circumstances that an employer might reasonably have believed itself within the *Manhart* "open market" exception. However, as to employer operated plans—such as Florida's—there is no excuse for continuing to employ sex based mortality tables after *Manhart*. This employer's liability flows directly from *Manhart*. For these reasons, the considerations which led the *Norris* court to conclude that it was inequitable to award monetary relief to persons retiring before August 1, 1983 have no application to this case and provide no bar to relief to the plaintiff class.

The employer also relies heavily upon *Probe v. State Teachers Retirement System*, 780 F.2d 776 (9th Cir. 1986) cert. denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2891 (1986) in support of its interpretation of *Norris* as foreclosing relief to pre-August 1, 1983 retirees. However, this reliance is very clearly misplaced for two reasons. First, to the extent *Probe* interprets *Norris* as announcing an unanticipated and unforeseeable interpretation of law applicable to the FRS, it is factually inapposite in this case. This employer's own internal memoranda overwhelmingly establishes that it recognized *Manhart* required it to discontinue use of sex based mortality tables and the likelihood of retroactive damages for its failure to do so. Second, *Probe* fundamentally misinterprets the *Norris* decision by failing to recognize that the only unanticipated and unforeseeable rule of law announced was that the *Manhart* open market exception did not permit employee pension plans administered by third party insurance companies to utilize sex based mortality tables.

The *Probe* Court held that while the employer's pension plan violated Title VII, under its interpretation of *Norris* retroactive relief was not appropriate. Citing *Norris*, *Probe* noted that retroactive relief may be denied where "an employer was not on notice by prior judicial decisions that its pension program was unlawful." 780 F.2d at 782. The *Probe* Court then held that *Norris* and not *Manhart* put the pension plan on notice that its plan was illegal:

While *Manhart* put all employer-operated pension funds on notice that they could not require men and women to make unequal contributions to the fund, it expressly held that

an employer could set aside equal contributions and let each retiree purchase whatever benefit is available on the "open market." 435 U.S. at 717-18, 98 S.Ct. at 1380. Thus, *STRS* reasonably could have assumed that it was lawful to provide an optional annuity system that reflected plans offered by insurance companies on the open market. Under these circumstances, we conclude that full retroactive relief is not appropriate.

780 F.2d at 782-83 (Emphasis added).

First, to the extent *Probe* holds that *Norris* and not *Manhart* put employers on notice that they could not offer discriminatory options equivalent to benefits available on the "open market", this holding is factually inapposite to this case. This is also true to the extent *Probe* may hold that *Norris* announced the "new" principle of law that optional discriminatory benefits were illegal. In this case it is not necessary to speculate about what a pension plan administrator might reasonably have thought was lawful. This employer has from the outset known or suspected that the FRS was controlled by *Manhart* beginning shortly after that decision was rendered.

Second, Plaintiff's class respectfully submits that *Probe's* analysis and interpretation of *Norris* is erroneous. As noted, *Probe* interprets *Norris* as holding that under the *Manhart* "open market" exception, an employer "reasonably could have assumed that it was lawful to provide an optional annuity system that reflected plans offered by insurance companies on the open market." 780 F.2d at 782-83. It was based upon this



interpretation that *Probe* further concluded that *Norris* precluded an award of retroactive relief.<sup>5</sup> *Id.* *Norris* did, of course, hold under the facts of that case that the employer could reasonably have assumed that its plan was within the *Manhart* "open market" exception and therefore was not violative of Title VII as construed in *Manhart*. However, this was clearly predicated solely on the fact that the plan in *Norris* was administered by independent third party insurance companies and not by the employer itself. *Norris*, 463 U.S. at 1086-91 and 1106. See, *EEOC v. Texas Industries Inc.*, 782 F.2d 547, 551 (5th Cir. 1986) (recognizing this distinction between *Norris* and *Manhart*).

*Probe* simply fails to recognize this as the critical issue decided in *Norris*. *Norris* did not hold, contrary to the *Probe* court's interpretation, that under the *Manhart* "open market" exception an employer in an employer-administered plan could reasonably have believed it could offer the same plans available on the open market. *Norris* held only that reasonable plan administrators could have construed *Manhart* as permitting an employer to actually bring in an outside insurance company to make available annuities "offered by insurance companies on the open market." 463 U.S. at 1106. *Norris* did not say "annuities similar to those offered by insurance companies" but only "offered by

<sup>5</sup>In fact, this employer did not so assume. This employer suspected its liability was based upon *Manhart* because it directly operated the pension fund. See pp.11-13, *supra*. The trial court made an express finding that "the State could not and did not reasonably assume that it could continue to use the sex-based tables" after *Manhart*. (A.62).

insurance companies on the open market." *Id.* (Emphasis added). The construction of *Norris* by *Probe* on this point is simply incorrect.

To the extent *Spirt II* purports to hold that *Norris* precludes any retroactive relief, it must be recognized that the plan at issue in that case, like the plan in *Norris*, was administered by an independent third party and not directly by the employer. *Spirt v. Teachers Insurance and Annuity Association*, 691 F.2d 1054, 1057 (2d Cir. 1982), *vacated for further consideration in light of Norris*, 463 U.S. 1223 (1983) ("*Spirt I*"). Thus, as applied to the facts of that case, *Spirt II*'s analysis of *Norris* may be correct. However, that analysis certainly does not apply in the case of an employer administered pension plan such as exists in the instant case.

Finally, even under *Norris* and/or *Probe* and/or *Spirt II*, a pension fund is protected against retroactive damages only if the system is adversely impacted by the damages award. In the instant case, some \$216 million dollars in "excess cash" was provided by the 1984 Legislature to pay "unexpected increases" in pension debts. (RA. 32). Obviously, a \$43.6 million judgment has no impact on a fund which enjoys a contingency budget more than four times that much money simply as "excess cash".<sup>6</sup> The employer's contrary arguments are, at best, disingenuous.

<sup>6</sup>By a separate Petition for Certiorari, Plaintiff's class asks this Court to increase this award by another \$157 million, thereby equalizing the differential between "unisex" and "female" pension rates and granting relief to pre-*Manhart* retirees for discriminatory payments received by them after *Manhart*. Even under this increased award, there would be no real impact. See case no. 86-1852.

Thus, contrary to the employer's contentions, the decision below is in complete accord with this Court's decisions in *Manhart* and *Norris*. Moreover, because of significantly different facts, there is no conflict with the Ninth Circuit's decisions in *Probe* and *Retired Public Employees* nor with the Second Circuit's decision in *Spirit II*. Accordingly, the Petition fails to establish any reason for certiorari review of the Eleventh Circuit's opinion in this case.

## II.

### THE ELEVENTH CIRCUIT PROPERLY APPLIED THE "CONTINUING VIOLATION" PRINCIPLE IN ACCORDANCE WITH ESTABLISHED SUPREME COURT AND CIRCUIT COURT CASE LAW

Petitioners also seek review of the Eleventh Circuit's application of the "continuing violation" principle in defining the scope of the class entitled to relief.<sup>7</sup> As noted, the Eleventh Circuit held that each month's smaller pension check to class members constituted a distinct and separate discriminatory event

<sup>7</sup>The significance of the application of the continuing violation principle to determine the discriminatory event is twofold. First, it determines the timeliness of the filing of EEOC charges by certain class members pursuant to 42 U.S.C. §2000e-5(e) which provides that charges must be filed within 300 days of the discriminatory event. Second, it determines class membership because only those who suffered the same discriminatory event within the 300 day period preceeding the EEOC filing may participate in the class.

and a separate and distinct violation of Title VII. Thus, the Eleventh Circuit held that Petitioners' conduct constituted continuing discrimination in violation of Title VII. In so holding, the circuit court rejected Petitioner's argument that the only discriminatory event occurred as of the date of each class member's retirement when the sex-based mortality tables were used to calculate what the retiree's monthly benefit payments would be. Because the Eleventh Circuit's application of the continuing violation principle is in complete accord with established case law of this Court and of the circuit courts, this issue provides no basis for certiorari review.

The difference between a single discrete act of discrimination and a continuing violation was addressed in *United Air Lines Inc. v. Evans*, 431 U.S. 553 (1977). In that case, the claimant was a stewardess who was forced to resign when she married in 1968 under a company policy which was subsequently held to violate Title VII. When she was rehired in 1972, she did not receive seniority credit for her prior service with the airline which had a continuing impact on her pay and fringe benefits. However, the Court distinguished this effect of a prior discriminatory act from current, ongoing acts of discrimination:

Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; *the critical question is whether any present violation exists*. She has not alleged that the system discriminated against former



female employees or that it treats former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason. *In short, the system is neutral in its operation.*

431 U.S. at 558 (Emphasis added).

Thus, a continuing discrimination does not exist where though the effect of a prior act of discrimination may still be felt, the person who suffered the discrimination is presently treated the same as others similarly situated. However, where the employer presently maintains a practice which discriminates against certain employees on the basis of race, sex, etc., the practice constitutes continuing discrimination, regardless of how long it has been since the practice began. The distinction between current, ongoing disparate treatment of similarly situated employees and the continuing effect of a past act of discrimination where similarly situated employees are nevertheless currently treated equally is well established in circuit court case law as well. *E.g. Perez v. Laredo Junior College*, 706 F.2d 731, 733-34 (5th Cir. 1983); *Stewart v. CPC International, Inc.*, 679 F.2d 117, 120 (7th Cir. 1982); *Allen v. United States Steel Corp.*, 665 F.2d 689 (5th Cir. 1982); *Roberts v. North American Rockwell Corp.*, 650 F.2d 823, 826-7 (6th Cir. 1981); *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 249 (5th Cir. 1980).

The practice here at issue clearly constitutes continuing discrimination. The Plaintiff class receives

a smaller pension benefit check each month than an identically situated female retiree due solely and exclusively to sex. This is not the situation where despite the effect of a past discrimination they are currently receiving equal treatment. To this day Petitioners continue to discriminate against these class members.

This decision is also consistent with *Bazemore v. Friday*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 3000, 3006 (1986) in which this Court reaffirmed the basic principle that "each week's pay check that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII. . . ." Petitioners' distinction of *Bazemore* as a "pure salary case" rather than a "pension case" is untenable. The only different considerations suggested by *Manhart* and *Norris* which may in appropriate circumstances (not present here) apply to a pension case are equitable factors as they bear on the propriety of an award of retroactive relief. There is no principled basis for distinction between pension, salary or other areas of discriminatory employment practices in determining when the violation(s) of Title VII occur(s).

The inconsistency of Petitioners' contention that the date of retirement is the discriminatory event—because that is when the discriminatory benefit payments are calculated—with *Bazemore* is easily demonstrated. *Bazemore* clearly would not uphold unequal paychecks for black and white employees simply because the employer maintained separate pay schedules for black and white employees at the time of hire, thus making the date of hire the discriminatory event. Similarly, the mere maintenance of separate male and female mortality tables does not make the date of retirement



the discriminatory event. The discrimination occurs when unequal monthly benefit checks are received and occurs anew with each month's unequal check. Thus, the Eleventh Circuit's application of the continuing violation principle to determine the discriminatory event is entirely consistent with the decisions of this Court and of the circuit courts and does not warrant certiorari review.

This also disposes of the argument that Class Representative Rassler (and class member Samaha) failed to timely file an EEOC charge because it was not filed within 300 days of his date of retirement and therefore that Mr. Rassler is not a proper class representative.<sup>8</sup> Because Petitioners' conduct constitutes continuing discrimination, the EEOC charge could be filed at any time. Each month's disparate benefit check was (and is) a separate violation of Title VII and "the [300 day] limitations period begins anew with each violation. . . ." *Perez, supra*, 706 F.2d at 733-34. Moreover, the Plaintiff class properly includes all male retirees who received a disparate monthly benefit check within the 300 days preceeding the filing of a timely EEOC charge. Thus, the Eleventh Circuit's decision on this point is in complete accord with established law and provides no basis for certiorari review.

<sup>8</sup>These arguments appear as Part IV of Petitioners' "Reasons for Granting the Writ" at pages 27-29 of the Petition. The remainder of Part IV directed to the Class Representative Hughlan Long is addressed in Part III of this response, *infra*.

### III.

#### THE DETERMINATION THAT CLASS REPRESENTATIVE HUGHLAN LONG'S TITLE VII CLAIM IS NOT BARRED BY RES JUDICATA OR COLLATERAL ESTOPPEL IS CONSISTENT WITH KREMER AND ITS PROGENY

The determination that class representative HUGHLAN LONG's Title VII claim was *not* precluded by res judicata or collateral estoppel arising from the ruling in *Long v. Department of Administration, Division of Retirement*, 428 So.2d 688 (Fla. 1st DCA 1983) clearly does not conflict with this Court's decision in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) or *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 323 (1985) and their progeny. Petitioners' overstated rhetoric<sup>9</sup> notwithstanding, the Eleventh Circuit's decision is grounded upon basic, long established principles of res judicata and collateral estoppel applied to facts which are significantly different from those in *Kremer* and the other cases cited by Petitioners. Thus, there is no conflict or error to warrant certiorari review on this issue.

*Kremer* and its progeny stand for the proposition that where (1) a Title VII or equivalent state law claim, (2) is decided adversely to the claimant (3) on the merits (4) in a state administrative proceeding and (5) is then

<sup>9</sup>See Petitioners' Brief at page 25 regarding a "highly dangerous and erroneous precedent" which Petitioners characterize as a "flagrant disregard" of case law.

confirmed by a state court, that judicial decision will have *res judicata* or collateral estoppel effect to preclude a Title VII claim subsequently brought in federal court. *Res judicata* applies to preclude the assertion of a claim which has actually gone to final judgment on the merits or which could have been brought in an earlier proceeding. *Kremer*, 456 U.S. at 466 n.6. Collateral estoppel precludes relitigation of issues expressly decided or necessary to the final judgment in an earlier proceeding. *Id.*; *Gordon v. Gordon*, 59 So.2d 40, 44 (Fla. 1952).

Very simply, however, in this case there was no prior state administrative or judicial decision *on the merits* of a Title VII claim or of a state law equivalent. In the state proceedings Plaintiff Long alleged only claims for violation of Title VII and for violation of the equal protection clauses of the Federal and Florida Constitutions. No claim under the Florida equivalent of Title VII was brought or otherwise considered on the merits. The administrative hearing officer and state appellate court held they were without subject matter jurisdiction to hear the Title VII claim. 428 So.2d at 692. That claim was therefore not considered on the merits. The hearing officer and appellate court further held that the employment practices here at issue bore a "reasonable relation" to a legitimate governmental purpose and therefore did not violate the equal protection clauses of the Federal or Florida constitutions. *Id.* at 693.

Thus, the state proceedings do not constitute *res judicata* because the Title VII claim was not one which was actually brought and decided on the merits or which could have been brought in those proceedings. *Hirst v.*

*State of California*, 770 F.2d 776, 777 (9th Cir. 1985). Moreover, because there was no actual determination on the merits of a Title VII claim or its state law equivalent, the actual issues necessarily inherent in the state proceeding's determinations also have no collateral estoppel effect. The elements of the constitutional claims which were decided are significantly different (and more restrictive) than those of a Title VII claim. *Washington v. Davis*, 426 U.S. 229, 239 (1976). Accordingly, under the particular facts and circumstances of this case, the decision of the Eleventh Circuit does not conflict with *Kremer* and its progeny<sup>10</sup> and therefore does not warrant certiorari review of this issue.

---

<sup>10</sup>In *Burney v. Polk Community College*, 728 F.2d 1374 (11th Cir. 1984), and in *Hirst, supra*, both of which Petitioners contend conflict with this decision, there were actual resolutions of the discrimination claims on the merits which were subsequently confirmed by state courts. Thus, because these cases are factually distinct from this matter there is no conflict.

## CONCLUSION

Accordingly, for all of the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WOODROW M. MELVIN, JR.

*Counsel of Record*

KEITH OLIN

CINDY NIAD-HANNAH

RUDEN, BARNETT, McCLOSKEY,  
SMITH, SCHUSTER & RUSSELL,  
P.A.

One Biscayne Tower—Suite 2020  
Miami, Florida 33131  
(305) 371-6262

JEROLD FEUER

19 W. Flagler Street  
Miami, Florida 33130

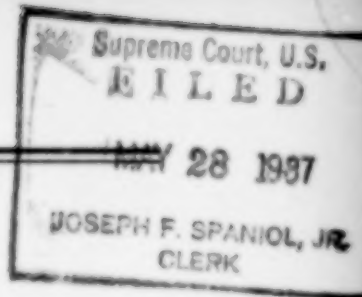
DAVID POPPER

7700 N. Kendall Drive—Suite 710  
Miami, Florida 33156

*Attorneys for Respondents*



# APPENDIX



6  
NO. 86-1685

in the **Supreme Court**  
of the **United States**

October Term, 1986

THE STATE OF FLORIDA, et al.,

*Petitioners,*

*vs.*

HUGHLAN LONG, S. DEWEY HAAS and CARL  
-RASSLER, individually and on behalf of all retired and  
present male employees subject to the Florida Retirement  
System established by Chapter 121, Florida Statutes, as  
well as the surviving joint annuitants of any deceased  
retired male employees,

*Respondents.*

RESPONDENTS' APPENDIX

WOODROW M. MELVIN, JR.

*Counsel of Record*

KEITH OLIN

CINDY NIAD-HANNAH

RUDEN, BARNETT, McCLOSKEY, SMITH,

SCHUSTER & RUSSELL, P.A.

One Biscayne Tower—Suite 2020

Miami, Florida 33131

(305) 371-6262

JEROLD FEUER

19 W. Flagler Street

Miami, Florida 33130

DAVID POPPER

7700 N. Kendall Drive—Suite 710

Miami, Florida 33156

*Attorneys for Respondents*

3718

# **INDEX TO APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

	<b>Page</b>
Memorandum to Robert L. Kennedy, Jr., State Retirement Director, from Lawrence J. Gibney, State Retirement Actuary, RE: Option Election, dated May 19, 1978 (Plaintiffs' Trial Exhibit 22) . . . . .	RA. 1
Memorandum to Mr. Andrew J. McMullian, III State Retirement Director, from Lawrence J. Gibney, State Retirement Actuary, RE: H. Long—Option Factors—Unisex Table, dated May 21, 1978 (Plaintiffs' Trial Exhibit 25) . . . . .	RA. 7
Memorandum to Mr. Andrew J. McMullian, III from Diane K. Kiesling, Department of Administration, Division of Retirement, RE: Use of Sex-Segregated Mortality Tables, dated July 10, 1981 (Defendants' Trial Exhibit 16) . . . . .	RA. 13
Memorandum to David V. Kerns, from Samantha Boge, Department of Administration, RE: Adoption of Unisex Actuarial Tables, dated September 1, 1981 (Defendants' Trial Exhibit 14) . . . . .	RA. 16
Florida Retirement Systems Bulletin, September 1984, Vol. 10. No. 1 (Plaintiffs' Trial Exhibit 13) . . . . .	RA. 18



**STATE OF FLORIDA  
Department of Administration**

Division of Retirement

**MAILING ADDRESS**  
530 Carlton Building  
Tallahassee, Florida 32304

**LOCATION**  
Cedars Executive Center  
2639 North Monroe Street  
Tallahassee, Florida

May 19, 1978

**MEMORANDUM**

**TO:** Mr. Robert L. Kennedy, Jr.  
State Retirement Director

**FROM:** Larry Gibney  
State Retirement Actuary

**SUBJECT:** Option Election

Attached is a study of the type of option selected at retirement for those individuals retiring during calendar year 1973 through 1977. This includes only members retiring from the Florida Retirement System (FRS, TRS, SCOERS, HP, JRS).

This analysis will serve as a guide as to developing a UNISEX table for option reduction factors. In light

of the recent Supreme Court decision, it is not a question of "if" but "when" we adopt such factors.

I would appreciate any comments you may have.

LJG:pl  
cc: Mr. M.T. McNab

RA. 2

## RETIRED PAYROLL

### Option Election—1973 to 1977

Calendar Year of Retirement	Option 1	Option 2	Option 3	Option 4	Total
1973 Male	\$ 932	\$ 522	\$ 447	\$ 227	\$ 2,128
Female	1,414	652	246	76	2,388
Total	\$ 2,346	\$ 1,174	\$ 693	\$ 303	\$ 4,516
	52%	26%	15%	7%	100%
1974 Male	\$ 766	\$ 458	\$ 398	\$ 158	\$ 1,780
Female	1,284	607	179	64	2,134
Total	\$ 2,050	\$ 1,065	\$ 577	\$ 222	\$ 3,914
	52%	27%	15%	6%	100%
1975 Male	\$ 862	\$ 418	\$ 454	\$ 173	\$ 1,907
Female	1,359	497	212	81	2,149
Total	\$ 2,221	\$ 915	\$ 666	\$ 254	\$ 4,056
	55%	23%	16%	6%	100%
1976 Male	\$ 1,051	\$ 441	\$ 486	\$ 145	\$ 2,123
Female	1,588	511	246	51	2,396
Total	\$ 2,639	\$ 952	\$ 732	\$ 196	\$ 4,519
	58%	21%	16%	5%	100%
1977 Male	\$ 1,112	\$ 447	\$ 478	\$ 138	\$ 2,175
Female	1,606	431	233	56	2,326
Total	\$ 2,718	\$ 878	\$ 711	\$ 194	\$ 4,501
	60%	20%	16%	4%	100%
1973-1977 Male	\$ 4,723	\$ 2,286	\$ 2,263	\$ 841	\$ 10,113
	47%	23%	22%	8%	
Female	\$ 7,250	\$ 2,698	\$ 1,115	\$ 329	\$ 11,392
	64%	24%	10%	3%	
Total	\$ 11,973	\$ 4,984	\$ 3,378	\$ 1,170	\$ 21,505
Percent	56%	23%	16%	5%	100%

RA. 3

### Option 1

<u>Calendar Year of Retirement</u>		<u>Number</u>	<u>Monthly Benefit</u>	<u>Average Benefit</u>
1973	Male	932	\$245,514	\$263
	Female	1,414	434,077	307
1974	Male	766	199,922	261
	Female	1,284	360,543	281
1975	Male	862	223,429	259
	Female	1,359	397,062	292
1976	Male	1,051	288,697	275
	Female	1,588	471,308	297
1977	Male	1,112	\$321,616	\$289
	Female	1,606	\$477,014	\$297

### Option 2

<u>Calendar Year of Retirement</u>		<u>Number</u>	<u>Monthly Benefit</u>	<u>Average Benefit</u>
1973	Male	522	\$147,812	\$283
	Female	652	199,597	306
1974	Male	458	121,520	265
	Female	607	179,285	295
1975	Male	418	124,766	298
	Female	497	166,980	336
1976	Male	441	142,964	324
	Female	511	176,892	346
1977	Male	447	160,228	358
	Female	431	154,664	359

(Average Reduction of Option 1 Benefit—Male 6%; Female 2½%—based on members ages 60 through 64)

### Option 3

<u>Calendar Year of Retirement</u>		<u>Number</u>	<u>Monthly Benefit</u>	<u>Average Benefit</u>
1973	Male	447	\$104,922	\$235
	Female	246	71,555	291
1974	Male	398	98,359	247
	Female	179	51,607	288
1975	Male	454	114,221	252
	Female	212	60,894	287
1976	Male	486	137,757	283
	Female	246	74,233	302
1977	Male	478	\$152,709	\$319
	Female	233	\$ 79,150	\$340

(Average Reduction of Option 1 Benefit—Male 27%; Female 18%—based on members ages 60 through 64, Female Spouse, 3 years younger; male spouse, 3 years older)

### Option 4

<u>Calendar Year of Retirement</u>		<u>Number</u>	<u>Monthly Benefit</u>	<u>Average Benefit</u>
1973	Male	227	\$97,276	\$429
	Female	76	26,832	353
1974	Male	158	62,818	398
	Female	64	20,422	319
1975	Male	173	78,580	454
	Female	81	27,519	340
1976	Male	145	70,752	488
	Female	51	18,025	353



1977	Male	138	\$70,767	\$513
	Female	56	\$19,300	\$345

(Average Reduction of Option 1 Benefit—Male 8%; Female 4.2%—based on members ages 60 through 64, Female Spouse, 3 years younger; male spouse, 3 years older)

**STATE OF FLORIDA  
Department of Administration**

Division of Retirement

**MAILING ADDRESS**  
530 Carlton Building  
Tallahassee, Florida 32301

**LOCATION**  
Cedars Executive Center  
2639 North Monroe Street  
Tallahassee, Florida

May 21, 1981

**MEMORANDUM**

**TO:** Mr. Andy McMullian—  
State Retirement Director

**FROM:** L. J. Gibney—State Retirement Actuary

**SUBJECT:** H. Long—Option Factors—Unisex Table

During our recent discussion of Mr. Long's letter especially with regard to the option factors, it appears to me we should make plans for implementing a "unisex" table by January 1983. We'll need to delay because of outstanding estimates. If we should decide to "bite the bullet" we could inaugurate a "unisex" table beginning September 1981 for estimates.

My reason for suggesting early implementation on our own is to avoid any possible retroactive liability that may arise. As I have mentioned in the past, the "unisex" factors are interpolated values between the present factors, the bases of which is our actual experience. As a result, the male benefit would increase and the female benefit would decrease. If we were forced by a court order to a "unisex" table, it's conceivable we would have to make adjustments back to the date of the Manhart Case which occurred in April 1978. We would have to increase the male benefits but I have my doubts as to whether we would be successful decreasing the female benefits. Hence, there could be a retroactive liability. On the other hand, if unisex factors were used from a certain date forward we would have no problem.

Let's discuss at your convenience.

LJG:mw

cc L. Dennard

\* \* \*

The following are illustrative examples of equivalent benefits payable under Option 3 for males, ages 64 and 66, and females, ages 64 and 66. In all examples, the Option 1 amount, \$10,000 per year, is the same whether the member is male or female. The length of service, earned credit and average final compensation are identical for both.

Although the Option 1 benefit is identical in all cases, the equivalent benefits derived for Option 3 are not because the expected future lifetime is materially different between the sexes. Generally, females will live approximately 4 to 6 years longer than males, both being at the same age. This is also reflected in the amount required to guarantee the Option 1 benefits—more money is required if the member is female as opposed to the member being male even though their benefits are identical.

For a male age 66, the amount of money required today to guarantee a benefit of \$10,000 per year for life is \$94,037. However, when Option 3 is elected with a spouse age 64, the \$94,037 will only buy a survivorship annuity of \$7,121. If the spouse were older, more of a benefit could be purchased; likewise, if the spouse were younger, less of a benefit would result.

The reduction in benefit to guarantee a continuing benefit to the survivor can be thought of as a "cost of insurance" to fulfill the guarantee. Using the example of a male age 66 and a J.A. age 64, the reduction in benefit is \$10,000 less \$7,121 or \$2,879 per year which can be thought of the amount necessary to guarantee

the continuation of the benefits. On the other hand, if the member were female age 66 and the J.A. age 64, the reduction in benefit would be less (\$10,000 - \$8,685 or \$1,315 per year) since cost of insurance is less for a female member as contrasted to that of a male member.

Another approach is to consider that when a male age 66 retires the Trust sets aside \$94,037 to pay for his benefit regardless of how or to whom it is paid. The election of the optional benefits is nothing more than entering into a "wagering" agreement with the Trust and the reduction in benefit is to compensate the Trust because of the introduction of another life or another condition. The reduction is so designed that in the long run with experience unfolding as predicted, the Trust will neither win nor lose, and likewise, the membership will neither win nor lose.

From time to time the argument is presented that if I defer retirement the reduction in benefit should be less because there are fewer years remaining during which a benefit would be payable. What is overlooked, however is that the probability of death increases as age advances and, therefore, the likelihood of paying a continuing benefit increases greatly. As an extreme example, suppose we had two male members 50 and 75 with identical benefits. The spouse of each is the same age.

<u>\$10,000 per Year Option 1</u>	<u>Amount Required</u>	<u>Equivalent Option 3</u>	<u>Reduction in Benefit</u>
Male Age 50	\$136,779	\$8,298	\$1,702
Male Age 75	68,110	6,994	3,006

If we change the illustration so that both the members are females whose probability of death is considerably less than the male, the following would result:

<u>\$10,000 per Year Option 1</u>	<u>Amount Required</u>	<u>Equivalent Option 3 Male J.A. Age 75</u>	<u>Reduction in Benefit</u>
Female Age 50	\$151,317	\$9,336	\$ 664
Female Age 75	81,988	8,459	1,541

LJG:mw  
5/15/81



Trust Assets Required to  
Pay an Option 1 Benefit  
of \$10,000 per Year for  
the Lifetime of the Member

Equivalent Annual Benefit  
Payable Until the Death  
of the last Survivor  
(Option 3)

		<u>Member Male Age</u>	<u>J.A. Female Age</u>	<u>Annual Benefit</u>
Male Age 66	\$94,037	66	55	\$6,150
		66	60	6,657
		66	64	7,121
		66	70	7,880
		66	75	8,492
		<u>Member Female Age</u>	<u>J.A. Male Age</u>	<u>Annual Benefit</u>
Female Age 66	\$111,636	66	55	\$7,831
		66	60	8,313
		66	64	8,685
		66	70	9,166
		66	75	9,467
		<u>Member Male Age</u>	<u>J.A. Female Age</u>	<u>Annual Benefit</u>
Male Age 64	\$100,044	64	55	\$6,532
		64	60	7,038
		64	66	7,724
		64	70	8,200
		64	75	8,749
		<u>Member Female Age</u>	<u>J.A. Male Age</u>	<u>Annual Benefit</u>
Female Age 64	\$117,669	64	55	\$8,161
		64	60	8,603
		64	66	9,080
		64	70	9,339
		64	75	9,585

## Department of Administration

### Division of Retirement

#### LEGAL OFFICE ADDRESS

Cedars Executive Center  
2639 North Monroe  
Suite 207 C—Box 81  
Tallahassee, Florida 32303  
(904) 487-1230

July 10, 1981

#### MEMORANDUM

TO: Mr. Andy McMullian

FROM: Diane K. Kiesling

Re: Use of Sex-Segregated Mortality Tables

Title VII of the Civil Rights Act of 1964 provides that:

[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin . . .

In the landmark case, *City of Los Angeles v. Manhart*, 435 U.S. 702, 98 S.Ct. 51 (1978), held that unequal contribution rates used to fund equal benefits.

The Court said that the words "individual" meant that any distinctions must be based on individual differences and not on the accepted concept that women live longer than men. It was argued that the different contributions were based on longevity, not sex. But the Court concluded that "one cannot say that an actuarial distinction based entirely on sex is based on any other factor other than sex. Sex is exactly what it is based on." In the lower court, retroactive relief was awarded, but the Court found such relief to be inappropriate in this case because:

- (1) the courts had been silent;
- (2) the government agencies had conflicting views;
- (3) formally amending a retirement plan is a slow process; and,
- (4) major unforeseen contingencies can jeopardize an insurer's solvency and, thus an insured's benefits.

Following *Manhart*, several cases have extended the Title VII protection to cases where contributions are equal, but annuity benefits are unequal because they are calculated based on sex-segregated mortality tables. The conclusion has been that the thrust of *Manhart* envisaged a single rate or unisex rate and that sex differentiated mortality tables are not permissible. See *Equal Employment Opportunity Commission v. Colby College*, 589 F. 2d 1139 (1st Cir. 1978); *Spirit v. Teachers Insurance and Annuity Assoc., et al*, 475 F. Supp. 1298 (S.D.N.Y. 1979); and *Peters, et al v. Wayne State University, et al*, 476 F. Supp. 1343 (S.D. Mich. 1979).

Another case which has serious potential to harm our system is *Norris v. Arizona Governing Committee*, 486 F. Supp. 645 (D. Ariz. 1980). In that case, further payment of benefits calculated under sex distinct mortality tables was enjoined and the court directed that annuity payments to retired females be adjusted to be equal to similarly situated male retirees.

This brings us back to the concept of retroactivity. The reasons for the Supreme Court's denial of retroactive relief in *Manhart* no longer exist and I suspect that retroactivity is going to start showing up in these types of cases in the future (just as it did in *Norris*). The courts are no longer silent and have not been for more than three years. Government agencies charged with applying the law are no longer in conflict. There has been ample time for formal amendment of retirement plans. Solvency problems can be overcome by implementation of an actuarially sound unisex table.

Based on the judicial decisions set forth above, it is suggested by this writer that the Florida Retirement System adopt a unisex actuarial table as soon as practicable. I would further point out that Section 121.091(6)(b) authorizes the administrator to adopt actuarial tables for the purpose of calculating retirement benefits. There is no necessity for legislative action prior to adoption of so-called unisex tables. This change can be achieved solely by amendment of the FRS rules.

Please feel free to call upon me if further information is needed.

DKK:lb

Department of Administration

435 CARLTON BUILDING  
TALLAHASSEE, FLORIDA 32301  
(904) 438-4116

September 1, 1981

Memorandum

TO: David V. Kerns  
FROM: Samantha Boge  
RE: Adoption of Unisex Actuarial Tables

After reviewing the series of articles provided by the Division of Retirement as well as the landmark decision in *City of Los Angeles v. Manhart*, 98 S. Ct. 51 (1978), I can only conclude that the Division would be well advised to convert from sex-distinct actuarial tables to unisex tables as soon as is practical.

As you know, the *Manhart* decision specifically only disapproved of an employer's requirement that females make larger monthly contributions to a retirement system than their male counterparts. Equal monthly benefits were received by male and female retirees. Of course, the employer relied on sex-distinct actuarial tables in arriving at the requirement of unequal contributions. The Court in *Manhart* reasoned that an individual woman could not be treated differently from other (male) employees simply on the basis of a forbidden

classification—namely sex—even though the assumed generalization about that class of persons was true. In other words, the simple fact that women as a class live longer than men is no justification for an employer to treat an individual woman employee differently than a man similarly situated. After all, women who smoke, drink or have high pressure jobs may possess a far shorter lifespan than an average male. Title VII requires that *individual* employees be treated equally without regard to their race, sex, etc.

Using sex-distinct actuarial tables resulting in higher monthly benefits for female retirees and their families than male retirees receive violates Title VII in my opinion, as surely as unequal monthly employee contributions. While such use may be permissible by insurers generally, it is not permissible by employers like the State of Florida.

I feel constrained to raise one final issue as a result of the Supreme Court's admonition to treat every employee as an individual. Is it only a matter of time until actuarial tables, unisex or not, using age as a factor, are forbidden by Courts interpreting the various Civil Rights laws? As you know Florida law includes age as a forbidden basis for discrimination in the employment arena. Seemingly, basing retirement benefit amounts on age would thus be impermissible for an employer.

SB/ss



## 1984 RETIREMENT LEGISLATION

The 1984 Legislature introduced 99 bills which directly or indirectly affected retirement and were of interest to the Division of Retirement. Of the 99 bills, 17 passed. One bill was a composite of 14 bills, providing amendments to 20 separate provisions of retirement law. The following summary will provide you with general information about the legislation which passed that may be of interest to you.

### Amendments Affecting Members' Benefits

1. Chapter 84-266, Laws of Florida—An amendment limits the accumulated annual leave that may be used in the Average Final Compensation to 500 hours and prohibits the use of bonuses. This legislation will not be effective until January 1, 1985, and will apply to FRS members who retire on and after that date.

2. Chapter 84-266, Laws of Florida—Amendments were made to the requirements for the purchase of military service for retirement credit and are effective July 1, 1984. Military service credit, which may be bought under 2 separate provisions, was amended in both instances.

- a. Credit for Military Leave-of-Absence is now worded to agree with the Federal Veteran's Reemployment Rights Act, 38 U.S.C. S.2021 which provides that any person who leaves a position of employment, other than temporary,

to enter the armed forces of the U.S., receives a satisfactory completion of service certificate, and applies for reemployment within 90 days after discharge shall, upon reemployment, be considered as having been on furlough or leave-of-absence, whether or not a military leave-of-absence was granted by the employer. The member may now receive more than 4 years of military service credit if the additional years were required for the convenience of the Federal Government; the military service does *not* have to be wartime; there is no longer a restriction against receiving credit for military service under the Florida Retirement System for the same period of military service used in another pension system; and the member must pay the required employee and employer contributions for the period of the leave, plus interest.

- b. Wartime Military Service Credit may be purchased by the member after 10 years of membership in the Florida Retirement System. The 1984 legislation allows members who are also serving in the U.S. Reserve Forces to purchase military service credit even though the member is eligible to receive service credit in another pension plan for the same service. However, the member must pay the total actuarial cost of the increased benefit resulting from the use of military service credit.

3. Chapter 84-266, Laws of Florida—Past service credit for employment in a Multiple Offender Project administered by a State Attorney may be purchased under certain conditions.

## IN MEMORY OF A FRIEND

Max Kelley, a Division of Retirement employee for 22 years, died on June 14, 1984, after a brief illness. He was a native of Urbana, Illinois, and a Tallahassee resident for 34 years.

As Special Projects Coordinator, Max conducted seminars on retirement throughout the state, helping many members and employers to better understand the system. He also conducted workshops and orientation sessions for employees of the Division.

His career with the Division began under the old Teacher's Retirement System in August 1961 as an administrative assistant. When the Division of Retirement was created in 1971, he became Chief of the Bureau of Benefits, a position he held until being appointed as Special Projects Coordinator in 1979. His leadership and friendship will be missed, especially by the employees of the Division and by the many retirees and members under the FRS who knew him.

## Amendments with Fiscal Impact

4. Chapter 84-266, Laws of Florida—As a result of the 3-year actuarial review, the rates of retirement contributions for some classes of membership will increase and others will decrease. All rate changes are effective October 1, 1984, as follows:

Regular Class .....	12.24%
Special Risk Class .....	14.67%
Special Risk Administrative Support .....	13.09%
Judicial .....	21.79%
Governor, Lt. Governor, Legislative, Cabinet, States Attorney .....	10.98%
Elected County Officials .....	*16.97%

\*An intervening rate of 20.25% will be charged July 1, 1984-September 30, 1984 for elected county officials. This is the result of 1983 legislation.

5. Chapter 84-266, Laws of Florida—Provisions requiring the forfeiture of retirement benefits by public officers and employees who are found guilty or admit to certain offenses involving a breach of public trust were adopted. The specified offenses are:

- a. The committing, aiding, or abetting of an embezzlement of public funds;
- b. The committing, aiding, or abetting of any theft by a public officer or employee from his employer;
- c. Bribery in connection with the employment of a public officer or employee;

- d. Any other felony specified in Chapter 838;
- e. The committing of an impeachable offense;
- f. The committing of any felony by a public officer or employee who, willfully and with intent to defraud the public, or the public agency for which he acts or in which he is employed, of the right to receive the faithful performance of his duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or for some other person through the use or attempted use of the power, rights, privileges, duties, or position of his public office or employment position.

The amendments included the methods by which the retirement systems will be notified of possible forfeiture and the appeal rights for any employee whose benefits are forfeited.

6. Chapter 84-266, Laws of Florida—Actuarial studies of the Florida Retirement System Trust Fund are now required every 2 years instead of every 3 years. This will give the Division and The Legislature the ability to respond more quickly if funding problems are observed. In addition, the new law mandates the following changes:

- a. The valuation of plan assets will be based on a 5-year averaging methodology such as that specified in the U.S. Department of Treasury Regulations or a similar accepted approach designed to attenuate fluctuations in asset values.

- b. A narrative explaining the changes in the covered group over the period between actuarial valuations and the impacts of those changes on actuarial results.
- c. Where substantial actuarial changes in actuarial assumptions have been made, the study shall reflect the results as of the current date based on the assumptions utilized in the prior actuarial report.
- d. An analysis shall be included of the changes in actuarial valuation results by the factors generating those changes and shall include a reconciliation of the current actuarial valuation results with those from the prior valuation.
- e. Measures of funding status and funding progress designed to facilitate the assessment of overall solvency of the system will be included and will be used consistently in all actuarial valuations.
- f. Any increase in unfunded liability under the system arising from significant system amendments or changes in assumption will be amortized over 30 plan years, and any net increase in unfunded liability arising from experience losses or gains, or supplemental retiree benefit increases, shall be amortized within 15 plan years.

#### Amendments Affecting the Elected State Officers' Class (ESOC)

7. Chapter 84-11, Laws of Florida—Members of the Elected State Officers' Class (ESOC) who are employed



in two positions, one of which is not covered by the ESOC, may retire from the non-ESOC position and continue employment in the ESOC position, receiving retirement benefits and compensation simultaneously. Those members of the Elected State Officers' Class who applied for retirement under the provisions of a similar bill in 1983, but who retired from the same position in which their employment continued, were "unretired" by this legislation.

8. Chapter 84-266, Laws of Florida—An officer of the ESOC whose term was or is shortened by legislative or judicial apportionment may purchase service credit after the term of office is completed for the length of time he would have served had the term not been shortened.

9. Chapter 84-266, Laws of Florida—Effective July 1, 1984, members of the ESOC may upgrade service earned previously as an elected county prosecuting attorney to the ESOC with a value of 3% of average final compensation for each year that is creditable; upon payment of the required contributions.

In order to upgrade service, the elected officer must have been filling the elected office prior to the existence of the Florida Retirement System or prior to the position's inclusion in the Elected State Officers' Class. The value of the retirement credit received for such service would increase from the value earned as a regular member the value earned in the ESOC, upon payment of additional contributions and interest.

— Legislation passed in 1983 changed the method by which the cost is computed for purchasing service that is upgraded to the ESOC, effective July 1, 1984. The

member must now pay the difference between the total employee and employer contributions actually paid on the gross salary received, but not less than \$1,000 per month, and the total contribution rate required at the time the service was rendered for the class of elected state officers' service being purchased, plus required interest. Any service earned prior to July 1, 1972, may be purchased at the applicable rates in effect July 1, 1972.

#### Amendments Affecting Special Risk Members

10. Chapter 84-266, Laws of Florida—The definition of continuous service was amended so that certain law enforcement officers will not have a break in service (which causes the member to be unable to retire regardless of age when retiring with 25 continuous years of service) if:

- a. the employee was a law enforcement officer as defined in S. 121.0515(2)(a), while a member of the State and County Officers and Employees' Retirement System or the Highway Patrol Pension System, who resigned and was reemployed in a law enforcement position within 12 calendar months of resignation; or
- b. the employee was a state-employed law enforcement officer who resigned to run for an elected law enforcement office and was reemployed as a state law enforcement officer or elected to a law enforcement position within 12 months of the resignation.

The member will not receive retirement service credit for the interim period of time not employed.

11. Chapter 84-266, Laws of Florida—Effective July 1, 1984, the Division of Retirement will no longer require the submission of a copy of the special risk certification required in accordance with S. 943.14, F.S. for law enforcement and correctional officers. The member must continue to satisfy the requirements of the Criminal Justice Standards and Training Commission, and both the employee and employer must verify that the member is required to be certified on the application.

12. Chapter 84-266, Laws of Florida—Current law is amended effective July 1, 1984, to include in the Special Risk Class certified correctional officers who are the supervisor or command officer of a member or members who have special risk responsibilities.

13. Chapter 84-266, Laws of Florida—The death benefits provided to the child of a law enforcement officer or firefighter as provided in Chapter 83-115, Laws of Florida were amended to be effective July 1, 1980, and it also provides for the cessation of educational benefits after the child's 25th birthday. The Division of Retirement does not administer these death benefits.

#### **Amendments Affecting Retired Members**

14. Chapter 84-266, Laws of Florida—The provisions affecting reemployment were amended to be effective next year, July 1, 1985. At the time, retirees will be prohibited from employment with any agency participating in the Florida Retirement System for 12 calendar months following retirement. If reemployed during this period, the retiree must suspend his retirement benefit. After 12 months, the retiree may be

reemployed with no limitations. Effective July 1, 1985, the employer of any retiree filling a regularly established position must pay retirement contributions equal to the unfunded liability portion of the regular class membership, of currently 5.71%. The reemployment provisions are applicable to the Florida Retirement System, Teachers' Retirement System, State and County Officers and Employees' Retirement System and Highway Patrol Pension System, and those who retired under S. 112.05 F.S.

15. Chapter 84-266, Laws of Florida—Retirees are allowed, effective July 1, 1984, to change their joint annuitant under option 3 or 4, whether or not the joint annuitant is living. If living, the joint annuitant must be notified of the change. The retiree's benefit will be recalculated to be the actuarial equivalent of the member's current benefit, based on the age of the member and the new joint annuitant at the time of the change.

16. Chapter 84-266, Laws of Florida—As special group of retirees are eligible to receive a supplementary cost-of-living adjustment which shall be made in October of 1984. In order to be eligible the retiree must:

- a. have retired prior to January 1, 1976.
- b. not be receiving nor eligible to receive Social Security.
- c. receive a monthly benefit as of July 1, 1984 of less than \$1,000.



- d. have a minimum of 10 years of service credit.

The Division identified approximately 2,000 retirees who should be eligible for this increase, and will send these retirees an application. The remaining possibly eligible retirees will receive a notice requesting they contact the Division if they think they are eligible based on the criteria.

The adjustment received will be a percentage of the October 1, 1984 benefit based on years of service prior to retirement and years that have elapsed since retirement. The percent multiplied times the October benefit will be as follows:

- a. A retiree with 30 or more years of service will receive 1% multiplied by the number of complete years that have elapsed between retirement and July 1, 1984;
- b. A retiree with 20, but less than 30 years of service will receive 0.9% multiplied by the number of complete years elapsed between retirement and July 1, 1984;
- c. A retiree with 10, but less than 20 years of service will receive 0.8% multiplied by the number of complete years elapsed between retirement and July 1, 1984.

17. Chapter 84-266, Laws of Florida—All retirees must be provided with the opportunity to rejoin the health insurance plan offered by their former employer. This amendment provides that the employer must notify not later than January 1, 1985, all retired former

personnel or their eligible dependents, who shall have until April 1, 1985, to accept or reject, in writing, participation in the employer's group insurance or self-insurance plan.

## ACTUARIAL VALUATION COMPLETE

The actuarial firm of Tillinghast, Nelson and Warren, Inc., of Atlanta, has recently completed the three year actuarial valuation of the Florida Retirement System (FRS). This review is required by law and is designed to reveal the financial condition of the Florida Retirement System Trust Fund.

### Complex Formula

Simply put, an actuarial valuation is a set of complex calculations used to determine whether or not a retirement system has or will have sufficient funds to pay all retirement benefits promised. In making the calculations, actuaries usually identify separately the liability for the benefits already earned for retirees as of the valuation date (usually known as "actuarial accrued liability") and the liability for the future benefits that will be earned by employees (referred to as "normal cost"). The logic behind this valuation method is easy to understand. By identifying the cost of the current benefits and assuming that the cost will be met in the future through contributions designated for that purpose, the funding problem can be isolated to the unfunded liability for prior normal costs which were not paid, otherwise known as the unfunded actuarial accrued liability.



## Unfunded Actuarial Accrued Liability (UAAL)

Using factors such as return on investments, salary increases, payroll growth, terminations, disability, mortality, and others, the actuaries calculate the cost of benefits that will be earned from the date of the valuation into the future. This cost is usually expressed as a contribution rate or percentage of payroll for each member of the system and, as already mentioned, is referred to as the "normal cost." Then, using similar factors, the actuaries determine the cumulative cost for all past years and calculate the amount of money there should be in the retirement fund as of the valuation date if sufficient contributions had been paid for all years in the past, including interest that would have accumulated. The difference in the calculated amount that should have been paid and the actual amount that is in the retirement fund is called the unfunded actuarial accrued liability (UAAL). A payment schedule expressed as a percentage of each member's salary is designed by the actuaries to amortize or pay-off this unfunded liability, over a period not to exceed 30 years, as provided by law.

Applying the basic techniques just outlined, the actuarial firm of Tillinghast, Nelson and Warren, Inc., performed an actuarial valuation of the FRS and found that the unfunded actuarial accrued liability of the FRS as of July 1, 1983, was \$6,503,123,000. Three years earlier, in 1980, this liability was \$4,323,005,000.

Most of the increase in the UAAL was expected and was caused by the following:

1. There was an expected increase due to the payroll growth method used to amortize the unfunded

liability. This method, which was adopted by the Legislature in 1978, anticipates an increase in the UAAL for approximately 20 years and then a rapid decrease as the active payroll grows in size until the contributions are sufficient to not only cover each year's interest on the liability, but to begin amortizing the principal as well. (See further explanation in Section titled "Projection of UAAL").

2. A very substantial experience loss occurred over the three-year period since the last actuarial review in 1980. This loss is mainly attributable to salary increases for FRS members which were in excess of those assumed and to employee turnover which was much lower than assumed.

3. There were changes in the actuarial assumptions which resulted in a net increase in estimated actuarial liabilities, e.g., mortality experience was such that retirees were living longer than had been assumed.

Table 1 summarizes the assumed experience over the last three years with respect to certain economic factors.

TABLE 1

	1980 Assumption	1983 Assumption	1980-83 Actual Experience		
			80-81	81-82	82-83
Rate of Investment Return	8.50%	9.00%	9.60%	10.19%	9.68%
Individual Member Salary Increase Rate	8.00%	7.50%	11.60%	11.40%	9.70%
Total Payroll Growth Rate	6.75%	7.00%	12.20%	11.80%	11.30%

*All rates are average compound annual rates.  
Investment returns exclude realized and unrealized gains and losses.*

## New Contribution Rates

The end result of the actuarial valuation of the FRS is the development of contribution rates for each class of membership which are sufficient to pay the current and future retirement benefits earned by members and also to amortize the unfunded actuarial accrued liability in 30 years. The adequacy of these rates is dependent on several factors that were assumed in the course of the actuarial valuation, the three most critical being: 1) the assumption that the size of the membership payroll will grow by 7% per year; 2) the assumption that the long-term investment return of the retirement trust fund will equal 9% compounded annually; and 3) the assumption that salary increases will progress at 7.5% compounded annually. Table 2 shows the current and new rates of employer contributions as determined by the valuation.

**TABLE 2**

### Contribution Rates by Membership Class

Membership Class	Contribution Rates on Gross Salary	
	Current Rate	New Rate*
Regular	10.93%	11.99%
Special Risk	13.95%	14.42%
Special Risk Administrative Support	11.14%	12.84%
Judicial	22.55%	21.54%
Legislative/Attorneys/Cabinet	19.30%/20.95%/21.03%	10.73%
County Elected	19.30%	16.72%

\*The new rates will be effective October 1, 1984. The 1984 Legislature adopted rates .25% greater than those proposed above to guard against unexpected increases in the UAAL.

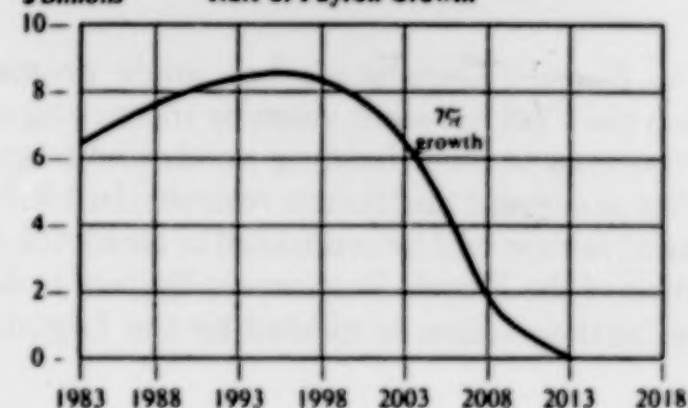
## Projection of UAAL

The UAAL is an interest-bearing obligation, similar to a mortgage. The UAAL represents a sum of money which, if actually deposited in the retirement trust fund and earning interest at the assumed rate, would, along with current assets and future normal cost contribution, be exactly sufficient to pay all future benefits for current members (if all assumptions are realized). If the UAAL were an asset of the trust fund, it presumably would be earning interest at the assumed 9% rate; since, however, it is a debt, it must be treated like a mortgage—by the payment of accrued interest.

Table 3 shows the projected growth of the UAAL.

**TABLE 3**

### Unfunded Actuarial Accrued Liability Amortization Pattern as Function of Annual Compound \$ Billions Rate of Payroll Growth



The following observations may be made from the table:

1. The UAAL grows for a number of years during which the payroll contributions are insufficient to meet each year's 9% interest requirement, thereby causing it to increase by the amount of the unpaid interest. If the actuarial assumptions are realized, the UAAL will reach its maximum in 1995, at which time the current UAAL of \$6.50 billion will have increased to \$8.66 billion.

2. After 20 years, the UAAL is approximately equal to the amount on July 1, 1983. This means, in effect, that only accrued interest has been paid during those 20 years and that the discharge of the entire principal amount occurs over the last 10 years—by which time the payroll is assumed to have grown to such proportions that the application of the contribution percentages produces rapid funding of the principal. Amortization of the entire principal is to be accomplished by the year 2013.

### Conclusion

The Florida Legislature has made provisions for funding the FRS in recent years by increasing employer contributions to meet funding needs and to guarantee benefits to current and future retirees. In 1985 another actuarial review will be conducted to check the financial condition of the Florida Retirement System to determine if any further action is needed by the Legislature.

---

*The Florida Retirement Systems Bulletin* is an official publication of DEPARTMENT OF ADMINISTRATION, Division of Retirement. Prepared by: Jenny Bryant,

Mary Beth Brewer, Mickey Campbell and Ron Poppell;  
the Research, Education & Policy Section.

This publication was promulgated at a cost of \$27,871.95 or \$.064 per copy for 430,000 copies to inform members of the policies and operations of the Florida Retirement System.



**AMICUS CURIAE**

**BRIEF**

MOTION FILED

APR 21 1987

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

STATE OF FLORIDA, *et al.*,  
 v. *Petitioners,*

HUGHLAN LONG, S. Dewey Haas, and Carl Rassler, indi-  
 vidually and on behalf of all retired and present male  
 employees subject to the Florida Retirement System  
 established by Chapter 121, Florida Statutes, as well  
 as the surviving joint annuitants of any deceased re-  
 tired male employees, *Respondents.*

On a Writ of Certiorari to the United States  
 Court of Appeals for the Eleventh Circuit

**MOTION TO SUBMIT BRIEF AS AMICI CURIAE AND  
 BRIEF AMICI CURIAE OF THE  
 EQUAL EMPLOYMENT ADVISORY COUNSEL AND THE  
 NATIONAL COUNCIL ON TEACHER RETIREMENT  
 IN SUPPORT OF THE  
 PETITION FOR A WRIT OF CERTIORARI  
 TO THE UNITED STATES COURT OF APPEALS  
 FOR THE ELEVENTH CIRCUIT**

ROBERT E. WILLIAMS  
 DOUGLAS S. McDOWELL \*  
 GAREN E. DODGE

McGUINNESS & WILLIAMS  
 1015 Fifteenth Street, N.W.  
 Suite 1200  
 Washington, D.C. 20005  
 (202) 789-8600

*Attorneys for Amici Curiae  
 Equal Employment Advisory  
 Council and National Council  
 on Teacher Retirement*

\* Counsel of Record

## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL COUNCIL ON TEACHER RETIREMENT FOR LEAVE TO SUBMIT BRIEF AS AMICI CURIAE .....	v
INTEREST OF THE AMICI CURIAE .....	2
STATEMENT OF THE CASE .....	2
SUMMARY OF REASONS FOR GRANTING THE WRIT .....	4
REASONS FOR GRANTING THE WRIT .....	5
REVIEW BY THIS COURT IS NECESSARY BECAUSE THE ELEVENTH CIRCUIT'S DECISION CONFLICTS DIRECTLY WITH APPLICABLE DECISIONS OF THIS COURT AND WITH DECISIONS IN OTHER CIRCUITS, AND BECAUSE IT WILL IMPOSE BURDENSOME AND INEQUITABLE RESULTS UPON THE ECONOMY AND INNOCENT THIRD PARTIES .....	5
I. REVIEW BY THIS COURT IS NECESSARY BECAUSE THE ELEVENTH CIRCUIT'S IMPOSITION OF RETROACTIVE BACK PAY IS DIRECTLY CONTRARY TO THIS COURT'S HOLDING, IN <i>NORRIS v. ARIZONA</i> , THAT <i>LOS ANGELES v. MANHART</i> DID NOT PUT EMPLOYERS ON NOTICE THAT USING SEX-BASED ACTUARIAL TABLES TO COMPUTE PENSION BENEFITS VIOLATED TITLE VII .....	5
A. Introduction .....	5



## TABLE OF CONTENTS—Continued

	Page
B. <i>Norris</i> Held That The 1978 <i>Mankart</i> Decision Did Not Put Employers On Notice Of The Impropriety Of Computing Pension Benefits With Sex-Based Actuarial Tables. Employers Were Not Put On Notice Until The <i>Norris</i> Decision Established That New Principle Of Law In 1983 .....	6
1. The Holding In <i>Mankart</i> Was Limited To The Issue Of Unequal Employee Contributions To A Fund, And Did Not Foreshadow The Rule Later Adopted Regarding Equal Contributions Resulting In Unequal Benefits .....	6
2. The Period Of Confusion In Court And Agency Rulings Between <i>Mankart</i> And <i>Norris</i> Did Not Foreshadow <i>Norris</i> And Did Not Put Employers On Notice .....	8
II. REVIEW BY THIS COURT IS NECESSARY BECAUSE THE ELEVENTH CIRCUIT'S DECISION EXPRESSLY CONFLICTS WITH DECISIONS IN OTHER CIRCUITS .....	11
III. REVIEW IS APPROPRIATE BECAUSE A RETROACTIVE APPLICATION WOULD IMPOSE BURDENSOME AND INEQUITABLE RESULTS .....	13
A. A Retroactive Application Would Substantially And Inequitably Burden Retirement Plans And The Economy In General .....	14
B. A Retroactive Application Would Harm Innocent Third Parties .....	16
CONCLUSION .....	18

## TABLE OF AUTHORITIES

Cases:	Page
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) .....	14
<i>Arizona Governing Committee v. Norris</i> , 463 U.S. 1073 (1983) .....	passim
<i>EEOC v. Colby College</i> , 589 F.2d 1139 (1st Cir. 1978) .....	9
<i>Furnco Construction Corp. v. Waters</i> , 438 U.S. 567 (1978) .....	vii
<i>Gardner v. Westinghouse Broadcasting Co.</i> , 437 U.S. 478 (1978) .....	vii
<i>Graham v. State of New York</i> , 43 FEP Cases 174 (S.D.N.Y. Feb. 17, 1987), <i>appeal pending</i> .....	13
<i>Hannahs v. New York State Teachers' Retirement System</i> , 26 FEP Cases 527 (S.D.N.Y. 1981), <i>later decision</i> , No. 78 Civ. 2541-CSH (S.D.N.Y. 1987), <i>appeal pending</i> .....	12, 13
<i>International Brotherhood of Teamsters v. United States</i> , 431 U.S. 324 (1977) .....	vii
<i>Long v. State of Florida</i> , No. TCA 82-1056-09, <i>aff'd</i> , 805 F.2d 1542 (1986), <i>reh'g denied</i> , 805 F.2d 1552 (11th Cir. 1987) .....	passim
<i>Los Angeles Department of Water and Power v. Manhart</i> , 435 U.S. 702 (1978) .....	passim
<i>Newport News Shipbuilding and Dry Dock Co. v. EEOC</i> , 462 U.S. 669 (1983) .....	vi, vii
<i>Peters v. Wayne State University</i> , 691 F.2d 235 (6th Cir. 1982), <i>remanded in light of Norris</i> , 463 U.S. 1223, <i>remanded to district court</i> , 718 F.2d 1110 (6th Cir. 1983) .....	8
<i>Probe v. State Teachers' Retirement System</i> , 780 F.2d 776 (9th Cir.), <i>cert. denied</i> , 106 S.Ct. 2891 (1986) .....	3, 4, 8, 11, 12
<i>Retired Public Employees' Ass'n (RPEA) v. California</i> , 614 F. Supp. 571 (N.D. Cal. 1984), <i>rev'd</i> , 799 F.2d 511 (9th Cir. 1986) .....	12, 14
<i>Shell Oil Co. v. Dartt</i> , 434 U.S. 99 (1977) .....	vii
<i>Sobel v. Yeshiva University</i> , 566 F. Supp. 1166 (S.D.N.Y. 1983), <i>rev'd</i> , No. 85-9019 (2d Cir.) .....	8, 9

## TABLE OF AUTHORITIES—Continued

	Page
<i>Spirit v. Teachers Insurance and Annuity Ass'n</i> , 475 F. Supp 1298 (S.D. N.Y. 1979), <i>affirmed as modified</i> , 691 F.2d 1054 (2d Cir. 1982), <i>vacated</i> , 463 U.S. 1223 (1983), <i>on remand</i> , 735 F.2d 23 (2d Cir.), <i>cert. denied</i> , 469 U.S. 881 (1984), <i>later proceeding</i> , 5 E.B.C. 2515 (S.D.N.Y. 1984).....	4, 8, 12
<i>Texas Department of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981) .....	vii
<i>Zipes v. Trans World Airlines, Inc.</i> , 455 U.S. 385 (1982) .....	vii
<i>Statute:</i>	
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e <i>et seq.</i> .....	vi, 16
<i>Miscellaneous:</i>	
Amicus Curiae Brief of the American Academy of Actuaries in <i>Norris</i> .....	15, 16
United States Department of Labor, Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits (1983) .....	9, 15

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

---

 No. 86-
 

---

STATE OF FLORIDA, *et al.*,  
 v. *Petitioners,*

HUGHLAN LONG, S. Dewey Haas, and Carl Rassler, individually and on behalf of all retired and present male employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, as well as the surviving joint annuitants of any deceased retired male employees,  
*Respondents.*

---

On a Writ of Certiorari to the United States  
 Court of Appeals for the Eleventh Circuit

---

MOTION OF THE  
 EQUAL EMPLOYMENT ADVISORY COUNSEL AND THE  
 NATIONAL COUNCIL ON TEACHER RETIREMENT  
 FOR LEAVE TO SUBMIT BRIEF AS AMICI CURIAE

---

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) and the National Council on Teacher Retirement (NCTR) move this Court for leave to file the accompanying brief as

amici curiae supporting the petitioners, the State of Florida, *et al.*, in this case. In support of this motion, EEAC and NCTR show as follows:

1. EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. All of EEAC's members are committed firmly to the fair and nondiscriminatory treatment of employees.

2. Substantially all of the Council's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* As employers, many of EEAC's members maintain employer-sponsored pension plans, and thus could be affected by the "devastating results" of retroactive liability of the type imposed by the court of appeals below, estimated by this Court in 1983 to "range from \$817 to \$1260 million annually for the next 15 to 30 years." *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1106 (1983) (opinion of Justice Powell).

3. NCTR is a nonprofit organization of 45 state, 13 local and 2 territorial retirement systems, some of which serve teachers exclusively, others of which include other state and local employee groups. NCTR's member system includes over 5 million active participants. NCTR's mis-

sion is to promote the sound and effective administration of public retirement systems in the interest of participants, beneficiaries, and the public. Among other functions, NCTR regularly consults with its members regarding changes in the law that affect them.

4. EEAC is recognized as a broadly-based national organization, and in that capacity has filed amicus curiae briefs in numerous cases before the United States Supreme Court and in all the federal circuit courts. In fact, because of its interest in the issue of sex-based mortality tables, EEAC filed an amicus curiae brief with this Court in *Norris*. In addition, EEAC and NCTR filed a brief in this case with the Eleventh Circuit below. EEAC also has filed briefs with this Court in such landmark Title VII cases as *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). As a result, because this case concerns the broad national impact of retroactive relief under Title VII, and because it calls for an important application of the Court's ruling in *Norris*, EEAC and NCTR are uniquely qualified to present their views to this Court.

5. In several cases, EEAC sought and was granted permission by this Court to file such briefs. *See, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Furnco*; *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); and *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977).

6. The written consent of counsel for the petitioners, the State of Florida, *et al.*, has been filed with the Clerk of the Court. Counsel for the respondents declined to give consent.



WHEREFORE, it is respectfully moved that EEAC and NCTR be granted leave to file the accompanying brief amici curiae in this case.

Respectfully submitted,

DOUGLAS S. McDOWELL  
McGUINNESS & WILLIAMS  
1015 Fifteenth Street, N.W.  
Suite 1200  
Washington, D.C. 20005  
(202) 789-8600  
*Counsel for Amici Curiae  
Equal Employment Advisory  
Council and National Council  
on Teacher Retirement*

April 21, 1987

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

\_\_\_\_\_  
No. 86-  
\_\_\_\_\_

STATE OF FLORIDA, *et al.*,  
v. *Petitioners,*

HUGHLAN LONG, S. Dewey Haas, and Carl Rassler, individually and on behalf of all retired and present male employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, as well as the surviving joint annuitants of any deceased retired male employees,  
*Respondents.*

\_\_\_\_\_  
On a Writ of Certiorari to the United States  
Court of Appeals for the Eleventh Circuit  
\_\_\_\_\_

**BRIEF AMICI CURIAE OF THE  
EQUAL EMPLOYMENT ADVISORY COUNSEL AND THE  
NATIONAL COUNCIL ON TEACHER RETIREMENT  
IN SUPPORT OF THE  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

\_\_\_\_\_  
The amici respectfully submit this brief as amici curiae in support of the petition for a writ of certiorari in this case filed by the State of Florida, *et al.* The motion of the amici to file this brief is attached, and the written consent of the State of Florida has been filed with the Clerk of the Court.

## INTEREST OF THE AMICI CURIAE

The interest of the amici is fully set forth in the accompanying motion.

## STATEMENT OF THE CASE

The State of Florida administers the Florida Retirement System (FRS), a defined benefit plan established to provide state employees and their beneficiaries an annuity upon retirement. Under the FRS plan used until August 1, 1983, Florida calculated the present value of an employee's optional benefits upon retirement by using sex-based mortality tables.<sup>1</sup> Since women, as a group, live longer than men and would receive benefits over a longer period of time, the State calculated the present value of a typical man's annuity plan to be lower than that of a woman's. As a result, the sex-based tables, applied to optional benefit forms, resulted in a lower monthly benefit paid to men than to similarly situated women.

Hughlan Long and other male members of FRS sued the State of Florida under Title VII of the Civil Rights Act of 1964, challenging the State's use of the sex-based mortality tables. The district court found that the practice constituted unlawful sex discrimination and awarded back pay with interest *retroactive* to October 1, 1978. Thus, the court imposed retroactive liability prior to the effective date of *Norris* (August 1, 1983), as well as liability for future payments, even though this Court in both *Norris* and *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), declined to award such relief. The lower court declined to follow

<sup>1</sup> The standard benefit, a straight life annuity, was and is identical for men and women. Upon the effective date of the *Norris* decision, Florida discontinued the use of sex-based tables for the optional benefits as well.

those holdings, reasoning instead that "the state was on notice at least from the date of *Manhart* [April 25, 1978] that the use of sex-based mortality tables was impermissible." Slip. op. at 31.

The Eleventh Circuit, in affirming the trial court decision, first rejected the State's argument that its use of sex-based tables was permissible until 1983. The court reasoned that the FRS was put on notice when *Manhart* was decided, even though *Manhart* had established an "open market" exception in 1978, permitting employers to make available annuities offered by insurance companies on the open market, which was not overruled until the 1983 *Norris* decision. In finding that the State should not have relied on this open market exception, the Eleventh Circuit expressly rejected the Ninth Circuit's contrary reasoning in *Probe v. State Teachers' Retirement System*, 780 F.2d 776 (9th Cir.), *cert. denied*, 106 S. Ct. 2891 (1986) as "wrong as a matter of law." 805 F.2d at 1548.

The court then affirmed the district court's holding that the FRS was liable for benefits retroactive to 1978, reasoning that while the impact "on pension funds and innocent third parties may be burdensome, it will not be devastating." *Id.* at 1550. The court explained this conclusion on the grounds that Florida has a "surplus in the fund of over \$200 million. . . . As a result the impact on Florida taxpayers is not great." *Id.* at 1551. Similarly, the appeals court declined to consider evidence of the impact on pension funds on the national level. The court explained that *Manhart* put "all pension funds on notice" that benefits could not be based on sex-distinct mortality tables; "all funds, like the FRS, were forewarned and should have converted to sex-neutral mortality tables at that time. The impact on those pension funds that failed to follow the law after *Manhart* should not be considered here." *Id.*

## SUMMARY OF REASONS FOR GRANTING THE WRIT

Review by this Court is necessary because the Eleventh Circuit imposed retroactive relief in direct conflict with this Court's decision in *Norris*, which held that "only benefits derived from contributions collected after the effective date of the judgment [August 1, 1983] need be calculated without regard to the sex of the employee." *Norris* at 1107 n.12 (Powell, J.). Clearly, this Court's 1978 decision in *Manhart* did not put employers on notice that sex-based actuarial tables could not be used to compute pension benefits. *Manhart* dealt only with unequal contributions to a fund and, in fact, established an "open market" exception which appeared to sanction plans that did not require unequal contributions and paid annuities as would a private insurer. That exception was not overruled until *Norris*. In addition, the lower courts in the period between *Manhart* and *Norris* gave conflicting opinions about the effect of *Manhart*. Thus, the new rule of law prohibiting pension benefits calculated with sex-based actuarial tables was not foreshadowed until *Norris*, in 1983.

In addition, review by this Court is necessary because the Eleventh Circuit's decision conflicts directly with applicable decisions in other circuits. Specifically, the court below rejected *Probe v. State Teachers' Retirement System*, a Ninth Circuit case directly on point, calling it "wrong as a matter of law." 805 F.2d at 1548. The decision below also conflicts with the reasoning by the Second Circuit in *Spirit v. Teachers Insurance and Annuity Ass'n*, 735 F.2d 23 (2d Cir.), cert. denied, 469 U.S. 881 (1984).

Finally, review by this Court is appropriate because retroactive relief would impose burdensome and inequitable results upon other retirement plans and innocent third parties. In fact, Justice Powell, in his opinion in *Norris*, cited an industry-wide Department of Labor Study which estimated that the effect of retroactive liability on the

economy "would range from \$817 to \$1260 million annually for the next 15 to 30 years," *id.* at 1106, a consideration considered irrelevant by the Eleventh Circuit below. 805 F.2d at 1551.

## REASONS FOR GRANTING THE WRIT

**REVIEW BY THIS COURT IS NECESSARY BECAUSE THE ELEVENTH CIRCUIT'S DECISION CONFLICTS DIRECTLY WITH APPLICABLE DECISIONS OF THIS COURT AND WITH DECISIONS IN OTHER CIRCUITS, AND BECAUSE IT WILL IMPOSE BURDENSOME AND INEQUITABLE RESULTS UPON THE ECONOMY AND INNOCENT THIRD PARTIES.**

**I. REVIEW BY THIS COURT IS NECESSARY BECAUSE THE ELEVENTH CIRCUIT'S IMPOSITION OF RETROACTIVE BACK PAY IS DIRECTLY CONTRARY TO THIS COURT'S HOLDING, IN *NORRIS v. ARIZONA*, THAT *LOS ANGELES v. MANHART* DID NOT PUT EMPLOYERS ON NOTICE THAT USING SEX-BASED ACTUARIAL TABLES TO COMPUTE PENSION BENEFITS VIOLATED TITLE II.**

### A. Introduction.

The decision by the Eleventh Circuit is in direct conflict with the decision by this Court in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983). There, this Court, addressing "all employer-sponsored pension funds," held:

that all retirement benefits derived from contributions made *after the decision today* must be calculated without regard to the sex of the beneficiary. . . . The Court further holds that benefits derived from contributions made *prior to this decision* may be calculated as provided by the existing terms of the Arizona plan. . . . The Clerk is directed to issue the judgment August 1, 1983.

463 U.S. at 1074-75 (*per curiam*) (emphasis supplied). Significantly, *Norris* also determined that employers "may well have assumed" that pension programs providing



unequal benefits were lawful after *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), and that a retroactive application would have "devastating results" on the operation of the economy. See 463 U.S. 1105-06 at 1105-06 (Powell, J.) and 463 U.S. 1073 at 1109-10 (O'Connor, J., concurring).

As shown below, the Eleventh Circuit reasoned, in direct conflict with *Norris*, that the FRS was liable starting in 1978:

First, the system knew or should have known since the Supreme Court's decision in *Manhart* that any benefits based on sex-distinct mortality tables was impermissible under Title VII. Second, the award of retroactive relief would not "retard the operation" or "frustrate the purpose" of Title VII. The system's argument that retroactive relief is not needed to encourage it and other employers to follow this "new" interpretation of Title VII is unpersuasive. Third, although the impact on pension funds and innocent third parties may be burdensome, it will not be devastating.

805 F.2d at 1550 (emphasis supplied). Accordingly, in order to bring the Eleventh Circuit in line with this Court's prior ruling, this Court is requested to grant the petition herein and issue a writ of certiorari.

**B. *Norris* Held That The 1978 *Manhart* Decision Did Not Put Employers On Notice Of The Impropriety Of Computing Pension Benefits With Sex-Based Actuarial Tables. Employers Were Not Put On Notice Until The *Norris* Decision Established That New Principle Of Law In 1983.**

**1. The Holding In *Manhart* Was Limited To The Issue Of Unequal Employee Contributions To A Fund, And Did Not Foreshadow The Rule Later Adopted Regarding Equal Contributions Resulting In Unequal Benefits.**

The Eleventh Circuit below found that the FRS "knew or should have known since the Supreme Court's decision in *Manhart* that any benefits based on sex-distinct mor-

talities tables was impermissible under Title VII." 805 F.2d at 1550. This finding is in clear conflict with both *Manhart* and *Norris*.

In 1978, this Court established the new principle of law that sex-based actuarial tables could not be used to determine employee contributions to a pension fund. *Manhart*, 435 U.S. 702. Since this was the "first litigation challenging contribution differences based on valid actuarial tables," *id.* at 722, employers thus were put on notice for the first time by the Court in 1978 that the use of actuarially sound tables in computing contributions was discriminatory. In fact, this Court seemingly went out of its way to emphasize that it did not intend Title VII to "revolutionize the insurance and pension industries." *Id.* at 717. In doing so, the Court adopted an "open market" exception as follows:

All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund. Nothing in our holding implies that it would be unlawful for an employer to set aside retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.

*Id.* at 717-18 (footnote omitted).

It was this language which sparked active debate regarding *Manhart*'s application to a defined benefit plan, the type of plan involved herein. *Manhart*, in fact, seemed to sanction plans which did not require unequal contributions, and which paid annuities as would a private insurer.<sup>3</sup> Accordingly, employers like the FRS should not be imputed the knowledge that "any benefits based on sex-distinct mortality tables" were illegal, the rule imposed by the court below at 1550. On the contrary,

<sup>3</sup> Contrary to the holdings of the courts below, *Manhart* and the cases interpreting it did not limit the "open market exception" to those employers who retained third party insurers to provide their pension benefits. See n.5, *infra*.

an employer reasonably could have assumed that it was lawful to "make available to its employees annuities offered by insurance companies on the open market." *Norris*, 463 U.S. at 1106; See *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 782-83 (9th Cir.), cert. denied, 106 S. Ct. 2891 (1986).

**2. The Period Of Confusion In Court And Agency Rulings Between *Manhart* And *Norris* Did Not Foreshadow *Norris* And Did Not Put Employers On Notice.**

In the subsequent five years until the decision in *Norris*, employers, consultants, federal agencies and the courts wrestled with the applicability of *Manhart* and the open market exception. For example, while one court distinguished discrimination in contributions from discrimination in benefits, *Peters v. Wayne State University*, 691 F.2d 235 (6th Cir. 1982), remanded in light of *Norris*, 463 U.S. 1223, remanded to district court, 718 F.2d 1110 (6th Cir. 1983), other courts held that "classification of employees on the base of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage." *Norris* at 1081.<sup>3</sup> Ultimately, however, no court

<sup>3</sup> The district court in *Sobel v. Yeshiva University*, 566 F.Supp. 1166 (S.D.N.Y. 1983), rev'd, No. 85-9019 (2d Cir.), interpreted the Second Circuit's 1982 decision in *Spirit* to outlaw a payment of unequal benefits. *Spirit v. Teachers Insurance and Annuity Ass'n*, 475 F. Supp. 1256 (S.D.N.Y. 1979), affirmed as modified, 691 F.2d 1054 (2d Cir. 1982), vacated, 463 U.S. 1223 (1983), on remand, 735 F.2d 23 (2d Cir.), cert. denied, 469 U.S. 881 (1984), later proceeding, 5 E.B.C. 2515 (S.D.N.Y. 1984). The court in *Sobel*, however, was obviously concerned about following *Spirit* before the Supreme Court could decide *Norris*. *Sobel* stated:

Whether the Supreme Court will retreat from its *Manhart* holding or offer some reasonable means of applying it in a nondiscriminatory fashion remains to be seen. In any case, the Court is almost certain to comment upon several types of distribution options which have been offered to avoid a *Manhart* problem. Thus, because the matter of a proper solution

in the five years after *Manhart* decided whether Title VII permitted payment of *equal* benefits to men and women under one benefit scheme, but *also* permitted an optional benefit plan which calculated benefits using *sex-based* actuarial tables used by private insurers. In fact, in *EEOC v. Colby College*, 589 F.2d 1139, 1146 (1st Cir. 1978), Chief Judge Coffin's concurring opinion speculated that it might be proper under Title VII to include within an optional pension plan "unequal, actuarially sound pension and life insurance benefits for participating men and women."

It is also clear that many employers were uncertain about the precise applicability of *Manhart* and its progeny. More importantly, it is evident that employers felt that they were not put on notice to disregard sex-based actuarial tables in all respects. Indeed, in 1983 the United States Department of Labor prepared a Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits ("DOL Study").<sup>4</sup> That study found that "[s]ubstantial percentages of both [defined benefit and defined contribution] plans follow the customary insurance industry practice of using sex-segregated mortality tables in calculating annuity benefits." DOL Study at 2. Significantly, the DOL Study found that 45% of defined benefit plans and 74% of defined contribution plans still used sex-based tables to compute benefits at the time of the study's publication in January, 1983, *id.*, thus underscoring the potential impact of the Eleventh Circuit's decision.

It is clear, therefore, that the court below erred in discounting this period of confusion between 1978 and 1983 when it reasoned as follows:

to the pension issue in light of *Manhart* has been a continually troubling one . . . this Court will defer deciding upon the appropriate remedy in this case until such time as the Supreme Court has decided *Norris* . . .

*Sobel*, 566 F. Supp. at 1192 (footnote omitted).

<sup>4</sup> The DOL study was proffered as Defendant's Proffered Exhibit 10A-1 in the case herein.



First, although *Manhart* only addressed contributions to a pension plan, *its reasoning applies equally to benefits paid out under a pension plan*. Second, and most important, the open market exception applies exclusively to third parties, and, therefore, *a reasonable employer knew or should have known that its own optional annuity plans based on sex-distinct mortality tables were impermissible under Title VII*.

805 F.2d at 1548 (emphasis supplied). Despite the Eleventh Circuit's reasoning to the contrary, it is clear that no employer, fund administrator or federal judge had available the crystal ball that would enable them to read the *Norris* decision before its issuance. That reading was unavailable until 1983.

In fact, it was on July 6, 1983, that Justice Powell, writing for the majority in *Norris* on the question of relief, found that the narrow decision in *Manhart* did not provide notice to employers that would warrant retroactive application of the *Norris* rulings. *Norris* at 1105-6. He explained that, after *Manhart*, "an employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market." *Id.* at 1106. It was not until *Norris*, Justice Powell noted, that employers learned that *Manhart's* "open market" exception would not insulate from liability an employer that offered several annuity options which were "actuarially equivalent" by using sex-based mortality tables.

Clearly, therefore, employers were not put on notice of the proper use of unisex tables until *Norris*. Plan administrators, who have fiduciary duties, and who must keep the fund "actuarially sound," clearly cannot respond to speculative or unclear interpretations of the law. Accordingly, this Court should grant certiorari to reject the Eleventh Circuit's theory of "constructive notice," and instead acknowledge that the law was unclear, and that *Manhart* and its confused aftermath did not sufficiently

"foreshadow" *Norris* to justify retroactive application of its holding.

## II. REVIEW BY THIS COURT IS NECESSARY BECAUSE THE ELEVENTH CIRCUIT'S DECISION EXPRESSLY CONFLICTS WITH DECISIONS IN OTHER CIRCUITS.

It is also clear that certiorari is appropriate here because the decision of the Eleventh Circuit conflicts directly with the decisions in other circuits. Most significantly, the court below specifically stated its disagreement with *Probe v. State Teachers' Retirement System*, 780 F.2d 776, a decision by the Ninth Circuit involving similar facts arising under a similar state-administered plan, calling it "wrong as a matter of law." 805 F.2d at 1548. In *Probe*, a unanimous panel of the Ninth Circuit confirmed that the *Norris* prohibition of retroactive relief applied to defined benefit plans. *Probe*, 780 F.2d at 788. This panel of the Ninth Circuit then held:

While *Manhart* put all employer-operated pension funds on notice that they could not require men and women to make unequal contributions to the fund, it expressly held that an employer could set aside equal contributions and let each retiree purchase whatever benefit is available on the "open market." 435 U.S. at 717-18, 98 S. Ct. at 1380. Thus, STRS reasonably could have assumed that it was lawful to provide an optional annuity system that reflected plans offered by insurance companies on the open market. Under these circumstances, we conclude that full retroactive relief is not appropriate.

*Id.* at 782-83.<sup>5</sup>

<sup>5</sup> As *Probe* made clear, *Manhart* and the cases interpreting it did not limit the "open market exception" to those employers who retained third party insurers to provide their pension benefits. For example, insurance companies were not involved in applying sex-based actuarial tables in *Probe*; rather that system, like FRS herein, was self-insured. Even so, the Court in *Probe* held that



In fact, the Ninth Circuit recently affirmed its *Probe* decision in *Retired Public Employees' Ass'n (RPEA) v. California*, 799 F.2d 511 (9th Cir. 1986), a case which again involved a state-operated and administered plan like the plan herein. In *RPEA*, the Ninth Circuit found *Probe* "dispositive," calling an equalization in benefits for employees who retired before the state's switch to unisex tables "fundamentally retroactive." *Id.* at 515. Since the court below ignored the *RPEA* decision and directly rejected *Probe*—specifically calling it "wrong as a matter of law"—a conflict between the Ninth and Eleventh circuits is clear.

In addition, the decision of the Eleventh Circuit below conflicts with a decision by the Second Circuit, *Spirt v. Teachers Insurance and Annuity Ass'n*, 735 F.2d 23 (2d Cir. 1984), *cert. denied*, 469 U.S. 881 (1984). While *Spirt* awarded retroactive relief, that court recognized that the plan was unique because participants had no "settled expectations as to the amount of monthly benefits" and that the plans do not guarantee retirees a "certain stream of income." 735 F.2d at 27, 28. Contrarily, the FRS plan guarantees its retirees a fixed amount at retirement.

Further, *Spirt* noted that *Norris* would seem to "foreclose any possibility of the retroactive imposition of added financial burdens upon employers or plans," 735 F.2d at 29, while added financial burdens clearly would result in the instant case, the reasoning of the court below notwithstanding. See *Hannahs v. New York State Teachers' Retirement System*, No. 78 Civ. 2541-CSH at 8 (S.D.N.Y. March 9, 1987), *earlier decision*, 26 FEP Cases 527 (S.D.N.Y. 1981), *appeal pending* (*Spirt* "makes crystal clear that where a guaranteed payment

the employer "reasonably could have assumed that it was lawful to provide an optional annuity system that reflected plans offered by insurance companies on the open market." *Probe*, 780 F.2d at 783 (emphasis supplied).

may be identified, *Norris* precludes retroactive relief based on unisex tables which would impose a financial burden upon the plan"). But cf. *Graham v. State of New York*, 43 FEP Cases 174, 179-80 (S.D.N.Y. Feb. 17, 1987), *appeal pending* (permitting retroactive relief where unequal contributions, in the form of sick leave credits, were computed with sex-based tables).

Accordingly, it is clear that review on the writ of certiorari herein is appropriate because of the obvious and compelling conflict between the Eleventh Circuit and the two other circuits that have specifically addressed the issue.

### III. REVIEW IS APPROPRIATE BECAUSE A RETROACTIVE APPLICATION WOULD IMPOSE BURDENSOME AND INEQUITABLE RESULTS.

In addition to the compelling reasons explained above—the conflict between the Eleventh Circuit's decision and the decisions by this Court and other courts of appeals—another reason exists for this Court to review this case. Specifically, a retroactive award would impose burdensome and inequitable results, a reason cited by the Supreme Court in *Norris*:

There is no justification for this Court, particularly in view of the question left open in *Manhart*, to impose this magnitude of burden retroactively on the public. Accordingly, liability should be prospective only.

*Norris*, 467 U.S. 1073 at 1107 (footnote omitted). Accordingly, despite the Eleventh Circuit's finding to the contrary, 805 F.2d at 1551, a court should properly examine any award of retroactive relief for its effects on other retirement plans, the economy in general and on innocent third parties. See *Manhart* at 721-22 & n.42.

**A. A Retroactive Application Would Substantially And Inequitably Burden Retirement Plans And The Economy In General.**

The Eleventh Circuit, noting that the FRS has a "surplus in the fund of over \$200 million," found that the impact of its \$44.6 million judgment "is not great." 805 F.2d at 1551. The court then concluded that "the district court's refusal to consider evidence of the impact on pension funds on the national level was also not in error," and that the "impact on those pension funds that failed to follow the law after *Manhart* should not be considered here." *Id.*

Clearly the Eleventh Circuit improperly limited its inquiry to the impact on the local economy when the inquiry is properly one of national scope. In this regard, this Court found it essential, instead, to gauge "the potential impact which changes in rules affecting insurance and pension plans may have on the economy." *Manhart*, 435 U.S. at 721. In *Manhart*, the Court noted that "[f]ifty million Americans participate in retirement plans other than Social Security," and that "[t]he assets held in trust for these employees are vast and growing—more than \$400 billion was reserved for retirement benefits at the end of 1976 and reserves are increasing by almost \$50 billion a year." *Id.* . . . (footnote omitted). Accordingly, the Court stated that it "cannot base a ruling on the facts of this case alone." *Id.* at n.42. Rather, "[i]mportant national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.'" *Id.* (emphasis supplied), quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). See *RPEA*, 799 F.2d at 515.

In *Norris*, Justice Powell, writing for the majority on the question of retroactive relief, discussed the economic impact a retroactive rule would have on the economy. He stated that cost of complying with the district court's

retroactive award in *Norris* "would range from \$817 to \$1260 million annually for the next 15 to 30 years." *Norris* at 1106, citing DOL Study at 4, 32. Further, Justice Powell stated that "the minimum additional cost necessary to equalize benefits *prospectively* would range from \$85 to \$93 million each year for at least the next 15 years," a much lower cost than retroactive relief, but still a cost that is "prohibitive." *Norris* at 1095 n.1 (emphasis partially supplied).

Significantly, Justice Powell added that "[i]mposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits." *Norris* at 1106-07. Since "[i]ncome, excise and property taxes" would thus have to be levied, Justice Powell concluded that there "is no justification . . . particularly in view of the question left open in *Manhart*, to impose this magnitude of retroactivity on the public." *Id.* at 1107. Similar costs of benefit plans are of concern to private employers who also must receive increased contributions—either from their own resources or from employees—to fund retroactive relief of the type ordered below.

This prediction of vast economic harm to pension plans and the economy in general is echoed in the amicus brief prepared by the American Academy of Actuaries supporting the petition for a writ of certiorari in *Norris*. In that brief, the Academy stated that retroactive liability would affect the structure and assets of defined benefit plans consisting of "the largest part" of "trusteed pension and profit sharing plans," which amount to \$256,898,000,000.\*

\*The Academy stated in its brief in *Norris* as follows:

Statistics compiled by the American Council of Life Insurance indicate that by the end of 1980 the assets of trusted pension and profit sharing plans amounted in the aggregate to \$256,898,000,000. American Council of Life Insurance, 1981 Pension Facts 19. By far the largest part of this huge sum is



Accordingly, it is clear that retroactive liability like that imposed by the court below is inequitable, and could substantially threaten the solvency of pension benefits throughout the economy.

**B. A Retroactive Application Would Harm Innocent Third Parties.**

This Court also considers important the effect that retroactive application would have on *third parties*, a factor the Eleventh Circuit essentially discounted, calling the effect "burdensome" but not "devastating." 805 F.2d at 1550. In contemplating the propriety of retrospective relief, the Court in *Manhart* thus noted that "[d]rastic changes in the legal rules governing pension and insurance funds" could "jeopardize[] the insurer's solvency and, ultimately, the insureds' benefits." *Manhart* at 721. In concluding that retrospective relief was inappropriate, the Court noted that "[r]etroactive liability could be devastating for a pension fund. The harm would fall in large part on innocent third parties." *Id.* at 722-23 (emphasis supplied; footnote omitted).

Accordingly, the same harm could befall third parties where *benefits* are concerned that befell the third parties affected by the change in contributions in *Manhart*: "If the reserve proves inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future security but also for the unanticipated reduction in the

---

held under defined benefit pension plans. These plans are ordinarily adopted by larger and medium-sized corporations. They have, for the most part, provided for pensions in identical monthly amounts for similarly situated retired men and women employees. Title VII is likely to affect such plans to the extent that they provide optional forms of retirement benefits, however, since such annuity options are often based on sex-distinct factors.

Brief at 4, n.2.

contributions of past employees." *Id.* at 723. See *Norris* at 1110.

The potential harm to innocent third parties in this case is evident in the arguments advanced by the state of Florida.<sup>7</sup> But more importantly, innocent third parties in *future* cases will be injured should the decision of the court below be allowed to stand. Accordingly, this Court is requested to grant certiorari to reverse the award of retroactive relief ordered by the court below.

---

<sup>7</sup> As the State of Florida argued below, retroactive relief will affect the FRS significantly. There are 1,100 employers who presently participate in FRS, of which the State Government is but one. See Affidavit of Andrew J. McMullian, III (Doc. #53). Other participants include counties, school districts and municipalities. These units of local government are distinct from State Government, but are required to participate in FRS, and do not control benefit or funding decisions. Accordingly, an award of retroactive relief would have a significant effect on those local governmental units and the citizenry which they serve, the "innocent third parties" that should be protected by the courts.

In fact, the valuation report of Tillinghaast, Nelson and Warren, supplied to the Court by Notice of Filing dated March 20, 1984 (Doc. # 2714), estimates that if the plaintiffs are awarded the full retroactive topping up relief sought, the liability imposed upon units of local government would be \$140,790,000. The liability to Dade County alone would be \$29,700,000. The contributions from units of local government to amortize that liability over thirty years is estimated to be \$625,184,000. Thus, even Justice Powell's estimate of the economic impact of retroactive relief may understate the significance of the problem.



**CONCLUSION**

For the foregoing reasons, the amici respectfully urge this Court to grant the petition herein and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

ROBERT E. WILLIAMS  
DOUGLAS S. McDOWELL \*  
GAREN E. DODGE

McGUINNESS & WILLIAMS  
1015 Fifteenth Street, N.W.  
Suite 1200  
Washington, D.C. 20005  
(202) 789-8600

*Attorneys for Amici Curiae  
Equal Employment Advisory  
Council and National Council  
on Teacher Retirement*

\* Counsel of Record

April 21, 1987

# **JOINT APPENDIX**

12  
No. 86-1685

Supreme Court, U.S.  
FILED

NOV 27 1987

JOSEPH F. STANOL, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1987

— 0 —  
STATE OF FLORIDA, *et al.*,  
*Petitioners,*

v.

HUGHLAN LONG, S. Dewey Haas, and Carl Rassler, individually and on behalf of all retired and present male employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, as well as the surviving joint annuitants of any deceased retired male employees,

*Respondents.*

— 0 —  
**ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

— 0 —  
**JOINT APPENDIX**

— 0 —  
CHARLES T. COLLETTE  
Mang, Rett & Collette, P.A.  
Post Office Box 11127  
Tallahassee, Florida 32302  
(904) 222-7710

*Counsel of Record  
for Petitioners*

WOODROW M. MELVIN, JR.  
Ruden, Barnett, McClosky,  
Smith, Schuster  
& Russell, P.A.  
One Biscayne Tower  
Suite 2020  
Two South Biscayne Boulevard  
Miami, Florida 33131  
(305) 371-6262

*Counsel of Record  
for Respondents*

— 0 —  
**Petition for Writ of Certiorari filed April 21, 1987  
Certiorari granted October 5, 1987**



## TABLE OF CONTENTS

	Page
Items Omitted in Printing of Joint Appendix .....	v
Relevant Docket Entries .....	1
Plaintiffs' Amended Class Action Complaint, Filed Jan. 20, 1983 .....	13
Defendants' Answer to Amended Complaint, Filed Feb. 23, 1983 .....	23
Excerpts from Transcript of Trial/Impact Hearing Had on Feb. 3, 4, 5, & 10, 1986 (Transcripts, re- spectively, Record on Appeal Vol. #'s 18, 19, 20, & 21, and Dist. Ct. Doc. #'s 2923, 2924, 2925, & 2926, Filed June 25, 1986) .....	32
Testimony of Defendants' Witness Nevin G. Smith (R.O.A. Vol. #18, Doc. #2923) .....	34
Direct Examination .....	34
Cross Examination .....	44
Testimony of Defendants' Witness David V. Kerns (R.O.A. Vol. #18, Doc. 2923) .....	51
Cross Examination .....	51
Testimony of Defendants' Witness Andrew J. Mc- Mullian, III (R.O.A. Vol. #'s 18 & 19, Doc. #'s 2923 & 2924) .....	52
Direct Examination (R.O.A. Vol. #18) .....	52
Continuation of Direct Examination (R.O.A. Vol. #19) .....	69
Cross Examination .....	82
Redirect Examination .....	87
Recross Examination .....	88
Testimony of Defendants' Expert Witness Michael J. Tierney (R.O.A. Vol. #'s 19 & 20, Doc. #'s 2924 & 2925) .....	90

## TABLE OF CONTENTS—Continued

	Page
Direct Examination .....	90
Cross Examination (R.O.A. Vol. #19) .....	109
Continuation of Cross Examination (R.O.A. Vol. # 20) .....	120
Redirect Examination .....	131
Testimony of Defendants' Expert Witness James T. McClave (R.O.A. Vol. #20, Doc. #2925) .....	134
Direct Examination .....	134
Testimony of Plaintiffs' Witness E. J. Yelton (R.O.A. Vol. #20, Doc. #2925) .....	140
Direct Examination .....	140
Redirect Examination .....	145
Testimony of Plaintiffs' Witness Lawrence J. Gibney (R.O.A. Vol. #21, Doc. #2926) .....	146
Direct Examination .....	146
Redirect Examination .....	162
Defendants' Exhibit 1, Letter from U.S. Department of Health, Education & Welfare (HEW) Office of Civil Rights to Administrator of Florida Retirement System (FRS), Dated Oct. 30, 1978 .....	165
Defendants' Exhibit 2, Letter from HEW Office of Civil Rights to Administrator of FRS, Dated Nov. 29, 1978 .....	166
Defendants' Exhibit 4, Letter from Nevin G. Smith to Harry A. Johnston, Dated Aug. 17, 1979 .....	167
Defendants' Exhibit 5, Letter from HEW Office of Civil Rights to Administrator of FRS, Dated Nov. 16, 1979 .....	170
Defendants' Exhibit 13, Letter from Nevin G. Smith to Ernest Ellison, Dated July 10, 1984 .....	172

## TABLE OF CONTENTS—Continued

	Page
Defendants' Exhibit 14, Memorandum from Samantha Boge to David V. Kerns, Dated Sept. 1, 1981 .....	177
Defendants' Exhibit 16, Memorandum from Diane K. Kiesling to Andrew J. McMullian, Dated July 10, 1981 .....	179
Defendants' Exhibit 27, Memorandum from Andrew J. McMullian to All FRS Reporting Units, Dated July 21, 1983 .....	182
Plaintiff's Exhibit 12, FRS Investment Portfolio Distribution as of December 1985 .....	184
Plaintiffs' Exhibit 13, Florida Retirement System Bulletin, Dated September 1984 .....	185
Plaintiffs' Exhibit 18, Letter from Michael J. Tierney & F. Bard Brutzman (of Tillinghast, Nelson & Warren, Inc.) to Nevin G. Smith, Dated May 3, 1984 .....	203
Plaintiffs' Exhibit 19, Letter from F. Bard Brutzman to Andrew J. McMullian, Dated Feb. 8, 1983 (with enclosures dated, respectively, 2/8/83 & 3/12/82) .....	221
Plaintiffs' Exhibit 20, Memorandum from Lawrence J. Gibney to Robert L. Kennedy, Dated Nov. 16, 1976 .....	229
Plaintiffs' Exhibit 21, Memorandum from Lawrence J. Gibney to Robert L. Kennedy, Dated May 19, 1978 .....	237
Plaintiffs' Exhibit 22, Memorandum from Lawrence J. Gibney to David V. Kerns, Dated Aug. 9, 1978 .....	241
Plaintiffs' Exhibit 23, Memorandum to File by Lawrence J. Gibney, Dated Nov. 29, 1978 .....	243
Plaintiffs' Exhibit 40, Letter from Andrew J. McMullian to James L. Sublett, Dated June 25, 1981 .....	246

## TABLE OF CONTENTS—Continued

	Page
Decision & Opinion of U.S. 11th Circuit Court of Appeals, Dated Dec. 19, 1986 (805 F.2d 1542), with Subsequent Decision & Opinion Denying Panel Rehearing, Dated Feb. 19, 1987 (805 F.2d 1552) .....	249
Order of U.S. Supreme Court Granting Petition for Writ of Certiorari Limited to Questions 1, 2(A), 2(B) and 2(C), Filed Oct. 5, 1987 .....	272

ITEMS OMITTED IN PRINTING  
OF JOINT APPENDIX

The following opinions, decisions, judgments, orders, and pleadings have been omitted in printing this joint appendix because they appear on the following pages in the separately printed appendix to the Petition for Certiorari:

<i>Date Filed</i>	<i>Description</i>	<i>Pet. App. Page</i>
Mar. 16, 1984	Order of U.S. District Court for Northern District of Florida, Tallahassee Division .....	A37
April 26, 1984	Order of U.S. District Court for Northern District of Florida .....	A84
Mar. 1, 1985	Order of U.S. District Court for Northern District of Florida .....	A88
Feb. 3, 1986	Parties' Pretrial Stipulation in U.S. District Court for Northern District of Florida .....	A93
Mar. 31, 1986	Findings of Fact, Conclusions of Law, Opinion, & Order of U.S. District Court for Northern District of Florida .....	A37
May 28, 1986	Order Underlying Judgment of U.S. District Court for Northern District of Florida .....	A35
May 29, 1986	Judgment of U.S. District Court for Northern District of Florida .....	A33
July 7, 1986	Order of U.S. 11th Circuit Court of Appeals Granting Stay During Pendency of Appeal, Consolidating Appeals, & Expediting Case .....	A32



ITEMS OMITTED IN PRINTING  
OF JOINT APPENDIX—Continued

<i>Date Filed</i>	<i>Description</i>	<i>Pet. App. Page</i>
Feb. 19, 1987	Decision, Opinion, and Order of U.S. 11th Circuit Court of Appeals Denying Panel Rehearing .....	A25
Feb. 19, 1987	Order of U.S. 11th Circuit Court of Appeals Granting Stay of Issuance of Mandate Pending Certiorari until March 23, 1987 .....	A27
Mar. 10, 1987	Order of U.S. 11th Circuit Court of Appeals Extending Stay of Issuance of Mandate Pending Certiorari until April 22, 1987 .....	A30

RELEVANT DOCKET ENTRIES

<i>Date Filed</i>	<i>Dist. Ct. Docket #</i>	<i>Description</i>
<u>1982</u>		
July 2	1	Initial Class Action Complaint of Plaintiffs' Long & Haas filed in U.S. District Court for Southern District of Florida, Miami Division, against Defendants State of Florida and Robert Graham, Governor (case assigned to the Honorable Edward B. Davis, U.S. District Judge)
Sept. 9	18	Order Transferring Case to the U.S. District Court for the Northern District of Florida, Tallahassee Division (case assigned to the Honorable Maurice M. Paul, U.S. District Judge)
<u>1983</u>		
Jan. 20	55	Order Approving Stipulation for filing of Third Amended Class Action Complaint of Plaintiffs Long & Haas and for Service of Process upon Additional Defendants
Jan. 20	55 (Ex. "A")	Amended Class Action Complaint of Plaintiffs Long & Haas against Defendants State of Florida and Robert Graham, Governor, as well as Additional Defendants Nevin G. Smith, Secretary of the State's Department of Administration (D.O. A.), and Andrew J. McMullian, III, Director of D.O.A.'s Division of Retirement
Jan. 20	56	Order Approving Stipulation that Case Can Be Maintained as a Class Action

# RELEVANT DOCKET ENTRIES—Continued

Date Filed	Docket #	Description
	Dist. Ct.	
Jan. 20	57	Order Approving Stipulation, <i>inter alia</i> , Agreeing that Individually Named Defendants Are Sued Only in Official Capacity and Agreeing As to Exhaustion of Title VII Administrative Remedies
Feb. 8	67	Order by the Honorable Maurice M. Paul, U.S. District Judge for Northern District of Florida, Recusing Himself from Further Participation in Case
Feb. 17	68	Order Reassigning Case to the Honorable William H. Stafford, Chief U.S. District Judge for the Northern District of Florida
Feb. 23	69	Defendants' Answer to Plaintiffs' Amended Complaint
June 2	83	Civil Minutes of Motion Hearing Reflecting, <i>inter alia</i> , Dates by Which Parties' Cross-Motions for Summary Judgment Shall Be filed
July 15	87	Plaintiffs' Memorandum in Support of their <i>Ore Tenus</i> Motion to Modify the Class Made at June 2, 1983 Motion Hearing
July 15	89	Defendants' Suggestion of Lack of Article III Subject Matter Jurisdiction, Memorandum in Opposition to Plaintiffs' <i>Ore Tenus</i> Motion to Amend or Modify Class Certification, and Motion to Decertify the Class
July 21	90	Order Approving Notice to the Class, with Approved Opt-Out No-

# RELEVANT DOCKET ENTRIES—Continued

Date Filed	Docket #	Description
	Dist. Ct.	
		tice Form Attached (last day to opt out Aug. 31, 1983)
Aug. 11	1296	Notice of Appearance <i>pro se</i> by Judson Freeman, Esquire
Aug. 25	2238	Notice of Appearance <i>pro se</i> by David V. Kerns, Esquire
Sept. 6	2584	Motion & Memorandum of Carl A. Rassler for Leave to Intervene as Additional Named Plaintiff Representative
Sept. 14	2641	Notice of Filing Carl A. Rassler's Right-to-Sue Letter, with Right-to-Sue Letter Attached
Oct. 3	2662	Defendants' Motion to Dismiss for Lack of Article III Jurisdiction & for Summary Judgment
Oct. 3	2663	Memorandum in Support of Defendants' Motion to Dismiss & for Summary Judgment, with Affidavits & Exhibits Attached (Attachments "A"-"F")
Oct. 4	2665	Plaintiffs' Motion & Memorandum for Summary Judgment
Oct. 31	2676	Plaintiffs' Motion & Memorandum for Rehearing Seeking Decertification of Subclass "B" (i.e., seeking decertification of the subclass of post-August 1, 1983 retirees)
Nov. 1	2677	Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss & for Summary Judgment
Nov. 1	2678	Defendants' Notice of Filing Affidavits in Opposition to Plaintiffs'

# RELEVANT DOCKET ENTRIES—Continued

Date Filed	Docket #	Description
		Dist. Ct.
		Motion for Summary Judgment, with Affidavits of Andrew J. McMullian, III, David V. Kerns, & Nevin G. Smith Attached
Nov. 1	2679	Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment
Nov. 10	2683	Defendants' Memorandum in Response to Plaintiffs' Motion for Rehearing Seeking Decertification of Subclass "B"
Nov. 15	2684	Defendants' Notice of Filing Affidavits in Support of Their Response to Plaintiffs' Motion for Rehearing Seeking Decertification of Subclass "B", with Affidavits of Lawrence Gibney and Thomas P. Bleakney Attached
<u>1984</u>		
Mar. 16	2713	Order, <i>inter alia</i> , Granting Defendants Partial Summary Judgment as to Plaintiffs' § 1983 & Pendent State Law Claims, Granting the Intervention of CARL A. RASSLER as Additional Named Representative Plaintiff, Denying Decertification of Subclass "B" [but recertifying Subclass "B" (the post-August 1, 1983 retirees) under <i>Fed. R.Civ.P.</i> 23(b)(2), & leaving Subclass "A" (the pre-August 1, 1983 retirees) certified under <i>Fed.R.Civ. P.</i> 23(b)(1), (b)(2), & (b)(3)], Denying Defendants' Motion to

# RELEVANT DOCKET ENTRIES—Continued

Date Filed	Docket #	Description
		Dist. Ct.
		Dismiss for Lack of Article III Jurisdiction, Granting Plaintiffs' Partial Summary Judgment on Their Title VII Claims (declaratory relief only on the issue of liability), and Determining Need for Subsequent Assessment of Impact
Mar. 28	2719	Defendants' Motion & Memorandum for Reconsideration of March 16, 1984 Order's Grant of Partial Summary Judgment to Plaintiffs on Their Title VII Claims
April 26	2726	Order Denying Defendants' Motion for Reconsideration
May 10	2731	Plaintiffs' Motion & Memorandum for Partial Reconsideration of Court's Exclusion from the Class of Persons Who Retired Prior to April 25, 1978 (the date of the <i>Manhart</i> decision)
May 17	2732	Plaintiffs' Amended Motion & Memorandum for Partial Reconsideration of Court's Exclusion from the Class of Persons Who Retired Prior to April 25, 1978
May 21	2733	Defendants' Motion & Memorandum for Partial Reconsideration of April 26, 1984 Order, and Memorandum in Response to Plaintiffs' Motion & Amended Motion for Partial Reconsideration
June 11	2737	Plaintiffs' Memorandum in Opposition to Defendants' Motion for Partial Reconsideration



# RELEVANT DOCKET ENTRIES—Continued

Date Filed	Docket #	Description
		Dist. Ct.
June 13	2738	Defendants' Memorandum in Reply to Plaintiffs' Opposition Memorandum
July 6	2740	Affidavit of N. Louis Samaha
Sept. 27	2755	Order Scheduling Motion Hearing for Nov. 8, 1984, to Hear, <i>inter alia</i> , Arguments on Limiting the Class of Retirees
Nov. 2	2763	Plaintiffs' Trial Memorandum in Support of Calculation of Damages
Nov. 8	2764	Civil Minutes of Motion Hearing Held on Nov. 8, 1984 (erroneously listed in docket sheet as filed on 11/2/84)
<u>1985</u>		
Jan. 30	2769	Plaintiffs' Motion & Memorandum for Permanent Injunction
Feb. 8	2772	Defendants' Memorandum in Opposition to Plaintiffs' Motion for Permanent Injunction, and Defendants' Renewed Motion for Reconsideration of Order Filed March 16, 1984
Feb. 22	2777	Plaintiffs' Reply on Their Motion for Permanent Injunction, and Memorandum in Opposition to Defendants' Renewed Motion for Reconsideration
Mar. 1	2778	Order, <i>inter alia</i> , Establishing Schedules for Calculation of Retroactive Relief (back to the April 25, 1978 date of <i>Manhart</i> for retro-

# RELEVANT DOCKET ENTRIES—Continued

Date Filed	Docket #	Description
		Dist. Ct.
		spective benefits, back to the March 24, 1972 effective date of Title VII for prospective adjustment of benefits), Using Class Member Samaha's Initial December 27, 1979 EEOC Charge to Fix 42 U.S.C. § 2000e-5(g)'s Two-Year Liability Cut-Off Date, Denying Plaintiffs' Motion for Permanent Injunction, and Permitting Defendants Subsequently to Endeavor to Establish the Applicability of Proration to This Case
Mar. 26	2780	Plaintiffs' Motion & Memorandum to Strike Defendants' Proration Issue
April 4	2785	Defendants' Memorandum in Opposition to Plaintiffs' Motion to Strike
April 26	2787	Plaintiffs' Reply on Their Motion to Strike
July 19	2792	Transcript of Motion Hearing Held on November 8, 1984 (Record on Appeal Vol. #16)
July 22	2793	Plaintiffs' Renewed Motion & Memorandum for Summary Judgment and Permanent Injunction
Aug. 1	2794	Defendants' Notice of Filing of Authenticated Documents in Opposition to Plaintiffs' Renewed Motion, with Documents Attached

# RELEVANT DOCKET ENTRIES—Continued

<i>Date Filed</i>	<i>Docket #</i>	<i>Description</i> <i>Dist. Ct.</i>
Aug. 1	2795	Defendants' Memorandum in Opposition to Plaintiffs' Renewed Motion
Aug. 1	2796	Defendants' Notice of Filing Affidavits in Opposition to Plaintiffs' Renewed Motion, Readopting Earlier Filed Affidavits (Dist. Ct. Doc. #2678) and with New Affidavit of Michael J. Tierney Attached
Aug. 19	2799	Order Denying Plaintiffs' Renewed Motion for Summary Judgment & Permanent Injunction
<u>1986</u>		
Jan. 24	2875	Defendants' Motion & Memorandum for Reconsideration of ¶¶ 8, 11, & 12 of Order Filed March 16, 1984, and for Entry of Final Summary Judgment
Jan. 31	2879	Plaintiffs' Memorandum in Opposition to Defendants' Motion for Reconsideration
Feb. 3	2881A	Parties' Pretrial Stipulation
Feb. 3	2881	Plaintiffs' Impact Hearing Memorandum
Feb. 3	2882	Plaintiffs' Memorandum in Opposition to Defendants' Motion for Reconsideration
Feb. 3	2885	Plaintiffs' Impact Hearing Memorandum, with Appendix Attached
Feb. 10	2891	Civil Minutes of Impact Hearing Held Feb. 3, 4, 5, & 10, 1986

# RELEVANT DOCKET ENTRIES—Continued

<i>Date Filed</i>	<i>Docket #</i>	<i>Description</i> <i>Dist. Ct.</i>
Feb. 14	2886	Defendants' Proposed Judgment (First Alternative)
Feb. 14	2888	Defendants' Proposed Judgment (Second Alternative)
Feb. 21	2892	Clerk's List of Plaintiffs' Exhibits Admitted at Impact Hearing
Feb. 21	2893	Clerk's List of Defendants' Exhibits Admitted at Impact Hearing
Mar. 31	2896	Order Including Findings of Fact & Conclusions of Law and, <i>inter alia</i> , Awarding Prospective Adjustment of Pension Benefits to the Entire Plaintiff Class (i.e., those persons who retired after March 24, 1972, and before Aug. 1, 1983) with an Effective Commencement Date of April 30, 1986, Additionally Awarding Retrospective Adjustment of Pension Benefits to the Post- <i>Manhart</i> Portion of the Plaintiff Class (i.e., those persons who retired after Oct. 1, 1978, and before Aug. 1, 1983), and Directing Exact Amounts Be Calculated
April 10	2897	Plaintiffs' Motion for Reconsideration of Order Filed March 31, 1986
April 18	2898	Order Denying Plaintiffs' Motion for Reconsideration
April 29	2900	Defendants' Notice of Appeal to U.S. 11th Circuit Court of Appeals from Order Filed March 31, 1986

## RELEVANT DOCKET ENTRIES—Continued

Date Filed	Docket #	Description
		Dist. Ct.
May 2	2903	Plaintiffs' Notice of Appeal to U.S. 11th Circuit Court of Appeals from Order Filed March 31, 1986
May 6	2905	Parties' Stipulation & Joint Proposal Implementing Directives of March 31, 1986 Order, with Proposed Final Judgment Attached
May 8	2907	Plaintiffs' Amended Notice of Appeal from March 31, 1986 Order
May 28	2912	Order Underlying Judgment and, <i>inter alia</i> , Readopting & Confirming Orders Filed March 16, 1984 (Dist. Ct. Doc. #2713), and March 31, 1986 (Doc. #2896)
May 29	2913	Final Judgment Confirming Previous Orders and, <i>inter alia</i> , Awarding Prospective Adjustment of Pension Benefits to the Entire Plaintiff Class (those persons who retired after March 24, 1972, and before Aug. 1, 1983) Totalling Approximately \$32.3 Million in Present Day Dollars, and Additionally Awarding Retrospective Adjustment of Pension Benefits to the Post- <i>Manhart</i> Portion of the Plaintiff Class (those persons who retired after Oct. 1, 1978, and before Aug. 1, 1983) Totalling Approximately \$11.3 Million
June 4	2914	Defendants' Motion and Memorandum for Stay Pending Appeal
June 13	2917	Plaintiffs' Memorandum in Opposition to Defendants' Motion for Stay, with Affidavits of Hughlan Long & David J. Nye Attached

## RELEVANT DOCKET ENTRIES—Continued

Date Filed	Docket #	Description
		Dist. Ct.
June 13	2918	Order Denying Defendants' Motion for Stay Pending Appeal
June 18	2921	Defendants' Notice of Appeal to U.S. 11th Circuit Court of Appeals from Judgment Filed May 29, 1986
June 25	2922	Plaintiffs' Notice of Appeal to U.S. 11th Circuit Court of Appeals from Judgment Filed May 29, 1986
June 25	2923	Transcript of First Day of Impact Hearing Held on Feb. 3, 1986 (Record on Appeal Vol. #18)
June 25	2924	Transcript of Second Day of Impact Hearing Held on Feb. 4, 1986 (R.O.A. Vol. #19)
June 25	2925	Transcript of Third Day of Impact Hearing Held on Feb. 5, 1986 (R.O.A. Vol. #20)
June 25	2926	Transcript of Fourth Day of Impact Hearing Held on Feb. 10, 1986 (R.O.A. Vol. #21)
[Hereafter follow relevant docket entries in the U.S. 11th Circuit Court of Appeals]		
June 27	N/A	Defendants/Appellants' Emergency Motion & Memorandum for Stay Pending Appeal Filed in U.S. 11th Circuit Court of Appeals
June 27	N/A	Defendants/Appellants' Notice of Filing Affidavits in Support of Their Emergency Motion for Stay Pending Appeal, with Affidavits of E. J. Yelton & Andrew J. McMullan, III, Attached
July 7	N/A	Plaintiffs/Appellees' Memorandum in Opposition to Defendants'



**RELEVANT DOCKET ENTRIES—Continued**

<i>Date Filed</i>	<i>Docket #</i>	<i>Description</i>
	<i>Dist. Ct.</i>	
		Emergency Motion for Stay Pending Appeal
July 7	N/A	Order of U.S. 11th Circuit Court of Appeals Granting Defendants' Emergency Motion for Stay, Consolidating Appeals, and Expediting Case
July 9	N/A	Plaintiffs/Appellees' Motion for Reconsideration of July 7, 1986 Order Granting Defendants Stay Pending Appeal
Aug. 12	N/A	Order Denying Plaintiffs' Motion for Reconsideration
Dec. 19	N/A	Decision & Opinion of U.S. 11th Circuit Court of Appeals
Dec. 30	N/A	Defendants/Appellants' Motion for Stay of Issuance of Mandate Pending Certiorari
<u>1987</u>		
Jan. 8	N/A	Plaintiffs/Appellees' Petition for Panel Rehearing
Feb. 19	N/A	Decision & Opinion of 11th Circuit Denying Rehearing
Feb. 19	N/A	Order Granting Stay of Issuance of Mandate Pending Certiorari until March 23, 1987
Mar. 6	N/A	Defendants/Appellants' Motion for Extension of Stay of Issuance of Mandate
Mar. 10	N/A	Order Extending Stay of Issuance of Mandate Pending Certiorari until April 22, 1987

---

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
CASE NO. 82-1365-CIV-EBD

HUGHLAN LONG, and S. DEWEY	) [TCA 82-1056]
HAAS, individually, and on behalf	) [NORTHERN
of all retired and present employees	) DISTRICT]
subject to the Florida Retirement	)
System established by Chapter	)
121, Florida Statutes, and all	)
joint annuitants thereunder,	)
	)
Plaintiffs,	) AMENDED
	) CLASS ACTION
v.	) COMPLAINT
	)
The STATE OF FLORIDA, a gov-	)
ernmental body, and The Honorable	)
Robert Graham, individually and	)
as Governor of the STATE OF	)
FLORIDA, Nevin Smith and An-	)
drew J. McMullian III, individually	)
and as State Retirement Director	)
of the Division of Retirement,	)
Dept. of Administration of the	)
State of Florida.	)
	)
Defendants.	)

---

Plaintiff's, HUGHLAN LONG, and S. DEWEY HAAS, individually, and on behalf of all retired and present employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, The STATE OF FLORIDA, a governmental body, The Honorable ROBERT GRAHAM, as Governor of the STATE OF FLORIDA, Andrew J. McMullian III, Director of the Divi-

sion of Retirement the State of Florida, and Nevin Smith, Secretary of the Dept. of Administration of the State of Florida and allege:

1. This is an action arising under and jurisdiction is based upon the Constitution of the United States and Amendment 14 thereof, 42 USC Sec. 1983 and Title VII of the 1964 Civil Rights Act. (42 USC sec 2000e-2 et seq). Plaintiffs and the Class seek damages, declaratory relief, and injunctive relief pursuant to the laws of the United States of America and the laws of Florida.

2. Plaintiff's, HUGHLAN LONG and S. DEWEY HAAS, are residents of Florida and are retired employees holding vested pension and retirement rights under the Florida Retirement System established by Chapter 121, Florida Statutes. As such, each is a member of the Florida Retirement System.

3. The Defendants, the STATE OF FLORIDA, a governmental body and The Honorable ROBERT GRAHAM, as Governor of the STATE OF FLORIDA, each are authorized and charged with the duty and responsibility of lawfully administering the Florida Retirement System and owe a fiduciary duty to the Plaintiffs and the Class to administer said System in a non-discriminatory and lawful manner. At all times material to this action Defendant Andrew J. McMullian III (hereinafter referred to as McMullian) is and was the State Retirement Director and was charged with the duty of administering the Florida Retirement System (FRS), established by State law. Defendant Nevin Smith (hereinafter referred to as "Smith") is and, at all times material to this action, was the Secretary of Administration and the immediate su-

perior or superior of McMullian. Governor Graham is and, at all times material to this action, was Smith's immediate superior or superior. All are charged by law and/or are and were under a duty to administer FRS in a lawful manner. All or some of said defendants adopted and/or implemented and/or propounded the actuarial factors described herein and have refused and/or failed to comply with requirements Title VII of the 1964 Civil Rights Act and have discriminated unlawfully on the basis of a sexual stereotype in violation of said Title VII and of the Fourteenth Amendment to the Constitution of the United States of America as will be detailed later in the Complaint.

#### CLASS ACTION ALLEGATIONS

4. Plaintiff Class Representatives, HUGHLAN LONG S. DEWEY HAAS, bring this action pursuant to Federal Rule of Civil Procedure 23 on behalf of themselves and a class of other similarly situated persons:

(1) who are retired under the Florida Retirement System; and/or

(2) who are currently employed by employers subject to the Florida Retirement System and hold vested pension or retirement rights under the Florida Retirement System; and/or

(3) those persons holding rights as a joint annuitant of a male member under the Florida Retirement System, (hereafter a "joint annuitant").

5. The subject matter of this suit arises from a statutorily established pension retirement plan initiated for the benefit of all members of this class by the State of Florida pursuant to Chapter 121, Florida Statutes.



6. The Plaintiff Class is defined as all male persons retired and/or currently employed who are entitled to vested pension or retirement plan benefits and all persons, male or female, holding rights as a joint annuitant under the Florida Retirement System as established and administered pursuant to Chapter 121, Florida Statutes.

7. On information and belief, the representatives believe the number of Class Members to be many thousands.

8. Because members of the Plaintiff Class are dispersed throughout the State of Florida and elsewhere, and because of their numerosity, joinder of all Plaintiffs would be extremely costly, inefficient, and impractical, if not impossible.

9. All questions of law and fact which arise from the claims of the Class Representatives against the Defendants are common to, and substantially the same as the questions of law and fact which would arise if each individual Class Member were to sue individually. The claims of the representatives are substantially the same as those of all Class Members and the same relief is requested by each member of class as requested by the representatives. The Class Representatives have made extensive efforts to assert and protect the interests of the Class prior to the initiation of this Suit and have obtained qualified legal counsel to vigorously protect the interests of the entire Class throughout the course of this litigation. By reason of the similarity of the claims of the Class Representatives and the individual Class Members, the successful assertion of the representatives claims herein will necessarily establish determinations of fact and law adequate to prove the liability of the Defendants to each individual Class Member.

10. Because all Class Members claim relief pursuant to the same pension retirement plan, the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications which would establish incompatible standards of conduct for Defendants.

11. Adjudications with respect to individual members of the class would, as a practical matter, be dispositive of the interests of other members not parties to the adjudications and may substantially impair or impede their ability to protect their interests.

12. Formal demand for the relief has been made against the Defendants named herein and the Defendants have refused the relief requested on grounds applicable to all members of the Class.

13. The questions of law and fact common to the Class Representatives against the Defendants and to the claims of all Class Members against the Defendants, predominate over questions, if any, affecting only individual members and a Class Action is superior to other available methods, if in fact any such other methods are available which the Class Representatives deny, for the fair and efficient adjudication of the matters alleged herein.

14. This Complaint states several counts for the relief requested. In the event that any of the allegations in any one of the counts should conflict preclude allegations contained in another count, the allegations should be considered as made in the alternative.

#### COUNT ONE

15. Pursuant to Chapter 121, Florida Statutes, the State of Florida adopted actuarial factors contained



in Chapter 22 B-7 of the Rules of the Department of Administration, Division of Retirement. Said rules were adopted and effective from January 1, 1972, and repromulgated thereafter. Said actuarial factors are materially based and determined upon unlawful presumption that women have a longer life expectancy than do men. Said actuarial factors provide different values for men and women of the same birth date and age, and the presumption of differences of life expectancy based solely on sex is incorporated not only in said actuarial factors but in the mortality tables used by the Defendants at all times and in all calculations material to this action.

16. Plaintiffs and the Class are retired under the Florida Retirement System and have received, or are owed benefits pursuant thereto which were calculated through the aforesaid unlawful actuarial factors, or are presently employed with vested pension or retirement rights thereunder.

17. By reason of the foregoing, the Plaintiffs and the Class are now and/or will in the future (upon retirement) receive and be paid less pension or retirement benefits per month than do similarly situated female employees.

18. Said practice violates the equal protection provision of the Constitution of the United States and the Constitution of the State of Florida, as well as being violative of Title VII of the 1964 Civil Rights Act in that said practices structure of the Florida Retirement System are discriminatory on the basis of an unlawful sexual stereotype.

19. As a direct and proximate result of this discrimination, Defendants owe Plaintiffs the difference between

what has been paid and/or accrued to Plaintiffs under the present system of Florida Retirement System and those funds which have been paid and/or accrued to similarly situated females.

## COUNT TWO

20. HUGHLAN LONG and S. DEWEY HAAS, individually, and as representatives of the Class stated herein, sue all the Defendants on grounds that the Defendants have been unjustly enriched by virtue of the illegal and discriminatory practices as hereinbefore alleged. A cause of action for unjust enrichment is stated independently, in the alternative, and as an allegation supplemental to all other COUNTS stated herein.

21. The Defendants have received a windfall due to the said illegal and discriminatory practices.

22. The members of the Plaintiff Class have been damaged by the unjust enrichment of the Defendants to the difference between the value of their rights as presently provided by the illegal and discriminatory practices hereinbefore alleged and the value of their rights if said System is administered lawfully and free of discrimination or based upon sex.

## COUNT THREE

23. HUGHLAN LONG and S. DEWEY HAAS, for themselves and as representatives of the Class stated herein, state a cause of action against all Defendants named for breach of a fiduciary duty arising under the laws of Florida.

24. Plaintiff Class hereby alleges that by operation of the laws of the State of Florida and the United States

of America, the Defendants named herein have against equity and good conscience acquired possession and the alleged legal right to refuse or withhold payment of retirement or pension monies due, or to become due, to members of the Class, and such unconscionable acquisition of property or money of the Plaintiff Class constitutes a constructive trust.

25. The Defendants named herein acted in a fiduciary capacity pursuant to the trust relationship with the members of the Plaintiff Class by operation of the laws of the State of Florida and the United States of America.

26. The Defendants have breached their fiduciary duty to members of the Plaintiff Class by failing or refusing to authorize and use lawful, non-discriminatory actuarial tables, as is more particularly alleged elsewhere herein.

27. The members of the Plaintiff Class have been damaged by the breach of the Defendants' fiduciary duties to the extent of the loss of the economic benefits, due or to become due, to them under the Florida Retirement System. —

#### COUNT FOUR

28. This is an action for damages under Sec. 768.28 Florida Statutes and Plaintiffs sue Defendants in their official capacities. Plaintiffs restate, reaver and reallege those allegations other than those contained in Counts Three and Four above and further state and allege:

29. This is an action for damages in excess of the jurisdictional minimum of this Court.

30. The actions described above were wrongful and/or negligently performed acts by defendants.

31. At all times material to this action, defendants were under a duty to follow Constitutional and Statutory standards of equality and equal protection. Defendants have breached and continue to breach that duty as described above. Said duty and standards are not only defined by the federal statutes cited above but also by Sec. 110.105, Florida Statutes and the Human Rights Act of 1977, Sec. 23.161, Florida Statutes, et. seq. Chapter 110 and Chapter 768, Florida Statutes also waive the sovereign immunity of the State of Florida.

32. As a direct and proximate result of the wrongful or negligent action of defendants, Plaintiffs have suffered losses as described above and will continue to suffer said losses until relief is granted.

#### ATTORNEY FEES

33. The Plaintiff Class Representatives have in good faith retained the undersigned counsel to represent themselves and the Class stated herein, and are obligated to pay a reasonable attorney fee for their services. Plaintiff Class Representatives have contracted on behalf of the Class Members for the payment of reasonable attorney fees and expenses of litigation. Several members of the Plaintiff Class will contribute advance monies for the payment of costs and reasonable attorney fees and it is the desire of the Class Representatives and those contributing Class Members that all members of the Plaintiff Class should benefit from a successful protection of the fund which is the subject of this litigation.

## RELIEF REQUESTED

WHEREFORE, HUGHLAN LONG and S. DEWEY HAAS, for themselves and as representatives of a Class of others similarly situated, respectfully request this Court:

1. To order the Defendants to provide the Class Representatives with an accounting of all present and former male employees holding rights in and to the Florida Retirement System and of all joint annuitants holding rights under the Florida Retirement System.

2. To declare that the members of the Plaintiff Class are entitled to pension or retirement payments or benefits equal to such benefits provided for and to similarly situated female employees and to order the Defendants to recalculate and pay to the Class Members all monies to which they are and/or have been entitled under the Florida Retirement System based on actuarial tables that are not discriminatorily based upon sex as a factor with interest on past due payments.

3. To award reasonable attorney fees and costs to the Plaintiff Class and the undersigned counsel.

4. To award any other such damages and/or equitable relief as is proper.

[Jurat & Certificate of Service Omitted]

---

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

HUGHLAN LONG, et al.,

Plaintiffs,

vs.

CASE NO. TCA 82-1056

STATE OF FLORIDA, et al.,

Defendants.

---

DEFENSES AND ANSWER TO AMENDED  
COMPLAINT BY DEFENDANTS

Come now Defendants, the State of Florida; Robert Graham, individually and as Governor of the State of Florida; Nevin Smith, individually and as Secretary of Administration; and A. J. McMullian, III, individually and as State Retirement Director, and answer the Amended Complaint and say:

FIRST DEFENSE

1. It is admitted that this action arises under the Constitution of the United States, 42 USC § 1983 and Title VII of the 1964 Civil Rights Act, and that Plaintiffs seek the relief mentioned. It is denied that any claim for relief is stated and it is denied that Plaintiffs are entitled to the relief which they demand from this Court.

2. It is admitted that Plaintiffs Hughlan Long and Dewey Haas are retired employees holding vested pension rights under the Florida Retirement System and it is admitted that Plaintiff Long is a resident of the State of



Florida. The Defendants are without knowledge of the remaining allegations of paragraph 2.

3. Defendants admit that they are charged with the administration of the Florida Retirement System in a lawful manner. Defendants are without knowledge with respect to the allegations of the second (2d), third (3d) and fourth (4th) sentences of paragraph three (3). It is admitted that the Department of Administration, in consultation with the Florida Legislature, adopted, implemented and propounded the actuarial factors described in Chapter 22 B-7, Florida Administrative Code and that the individual defendants have administered the Florida Retirement System pursuant thereto. The remaining allegations in paragraph three (3) are denied.

4. Defendants admit that Plaintiffs Long and Haas purport to bring this class action as described in paragraph four (4) but deny that plaintiffs Long and Haas are adequate representatives of the described class.

5. Admitted.

6. Defendants admit that plaintiffs purport to define the class as described in paragraph six (6) but deny that plaintiffs Long and Haas are adequate representatives of the class as defined therein.

7. Admitted only as to the class as currently defined by plaintiffs.

8. Admitted only as to the class as currently defined by plaintiffs.

9. Without knowledge.

10. Without knowledge.

11. Without knowledge.

12. Defendants admit that a formal demand was made to the Department of Administration, Division of Retirement in a petition for administrative hearing filed by Hughlan Long. Defendants deny the remaining allegations of paragraph 12 and specifically deny that any demand has been made pursuant to Section 768.28, Florida Statutes.

13. Without knowledge.

14. Denied.

#### COUNT ONE

15. Defendants admit that the Department of Administration in consultation with the Florida Legislature adopted the actuarial factors contained in Chapter 22 B-7, Florida Administrative Code. It is admitted that said rules were adopted and effective from January 1, 1972, and repromulgated thereafter. It is denied that the actuarial factors are based on any presumptions, lawful or otherwise, but it is admitted that the actuarial factors are derived from empirical data and are the most accurate predictor of life expectancy given the present state of knowledge. Defendants are without knowledge as to the times material to this action; otherwise the remaining allegations of paragraph fifteen (15) are admitted.

16. It is admitted that Plaintiffs Long and Haas are retired and that some members of the purported class are retired under the Florida Retirement System. It is admitted that benefits pursuant to the Florida Retirement System are calculated through the aforesaid actuarial fac-

tors but it is denied that said actuarial factors are unlawful. It is further admitted that some members of the purported class, as currently defined, have vested pension rights under the Florida Retirement System.

17. Denied.

18. Denied.

19. Denied.

#### COUNT TWO

20. Denied.

21. Denied.

22. Denied.

#### COUNT THREE

23. Denied.

24. Denied.

25. It is denied that Defendants acted in a fiduciary capacity with respect to the issues raised in this action.

26. Denied.

27. Denied.

#### COUNT FOUR

28. It is denied that this action can be maintained under Section 768.28, Florida Statutes. Defendants reallege and incorporate their answers to the previous allegations of this Amended Complaint as if fully set forth herein.

29. Denied.

30. Denied.

31. Defendants admit the allegations within the first sentence of paragraph thirty one (31), except that defendants are without knowledge as to the times material to this action. The remaining allegations in paragraph thirty one (31) are denied.

32. Denied.

33. Without knowledge.

#### SECOND DEFENSE

34. The Amended Complaint does not state a claim upon which relief can be granted and/or is not within the jurisdiction of this Court by reason of the Tenth Amendment to the Constitution of the United States.

#### THIRD DEFENSE

35. The Amended Complaint does not state a claim upon which relief may be granted and/or is not within the jurisdiction of this Court by reason of the Eleventh Amendment to the Constitution of the United States.

#### FOURTH DEFENSE

36. The Amended Complaint, insofar as it purports to state pendent claims for relief under applicable Florida law and/or Article I, Section 2 of the Constitution of the State of Florida, fails to state a claim upon which relief may be granted.

#### FIFTH DEFENSE

37. The Amended Complaint must be dismissed for failure to join indispensable parties: all persons who are members of the Florida Retirement System and whose

rights have vested who are not parties plaintiff or a member of the class.

#### SIXTH DEFENSE

38. Counts TWO, THREE and FOUR of the Amended Complaint are not within the jurisdiction of this Court by reason of the Eleventh Amendment to the Constitution of the United States.

#### SEVENTH DEFENSE

39. Counts TWO, THREE and FOUR of the Amended Complaint are barred by the doctrine of sovereign immunity and/or fail to state a claim upon which relief may be granted.

#### EIGHTH DEFENSE

40. Counts TWO, THREE and FOUR of the Amended Complaint fail to state a claim for relief in that compliance with the notice requirements of Section 768.28(6), Florida Statutes, has not been alleged or effected, which compliance is a condition precedent to the institution of a claim in tort against the State of Florida or one of its agencies or subdivisions.

#### NINTH DEFENSE

41. Counts TWO, THREE and FOUR of the Amended Complaint must be dismissed by reason of plaintiffs' failure to comply with the provisions of Section 768.28(7) requiring serving process upon the Florida Department of Insurance.

#### TENTH DEFENSE

42. Counts TWO, THREE and FOUR of the Amended Complaint must be dismissed as to Defendant Andrew J. McMullian, III, inasmuch as said defendant is not a proper party defendant to this action pursuant to Section 768.28(9)(a), Florida Statutes.

#### ELEVENTH DEFENSE

43. Counts TWO, THREE and FOUR of the Amended Complaint fail to state a claim upon which relief may be granted against the individual defendants in their individual capacities.

#### TWELFTH DEFENSE

44. The Amended Complaint is barred by the doctrine of *res judicata* and/or collateral estoppel.

#### THIRTEENTH DEFENSE

45. Plaintiff Dewey Haas has not exhausted the administrative remedies which are conditions precedent to the filing of a complaint alleging a violation of Title VII of the Civil Rights Act of 1964 and any claim of Plaintiff Long with respect to Title VII of the Civil Rights Act of 1964 is barred by the doctrine of *res judicata* by reason of the decision of the District Court of Appeal for the First District, State of Florida, in the case of *Hughlan Long v. Department of Administration*, Division of Retirement, Case No. AL-51 (opinion filed February 8, 1983). Accordingly, Count I insofar as it relies upon Title VII of the Civil Rights Act of 1964 must be dismissed.



## FOURTEENTH DEFENSE

46. Plaintiffs' request for retroactive benefit adjustments beyond two years next preceding the date of filing of this Complaint is barred by Section 95.11(4)(c), Florida Statutes.

## FIFTEENTH DEFENSE

47. Plaintiffs' request for retroactive benefit adjustments beyond two years preceeding the filing of an appropriate charge of discrimination with the Equal Employment Opportunity Commission is barred by 42 USC § 2000e-5(g).

## SIXTEENTH DEFENSE

48. Defendants Graham, McMullian, and Smith have not been named in any equal Employment Opportunity Commission charge of discrimination with respect to the allegations of this Complaint and, under 42 USC § 2000e, therefore, may not be named as defendants in this actions insofar as it is based upon alleged violations of Title VII of the Civil Rights Act of 1964.

## SEVENTEENTH DEFENSE

49. Defendants assert their qualified immunity from suit under 42 USC § 1983 in that their actions did not violate any clearly established constitutional or statutory rights of plaintiffs. However, if the actions of defendants did violate plaintiffs' constitutional rights, defendants did not know nor could they have been expected to know that their actions violated such rights of plaintiffs.

## EIGHTEENTH DEFENSE

50. At all times material, the Defendants and each of them have administered the Florida Retirement System in a manner which in good faith was believed and is believed to be consistent with the requirements of Title VII of the Civil Rights Act of 1964, the Constitution of the United States, and all laws applicable to the operation of said system. The granting of retroactive relief as prayed for by Plaintiffs would result in either the loss of benefits to existing members of the Florida Retirement System who are not members of the Plaintiff class and whose benefits have vested or the imposition of conditions upon the Florida Retirement System Trust Fund rendering it actuarially unsound in the future. It is therefore unjust and inequitable to award retroactive benefits to members of the Plaintiff class in the event that a determination is made that the Florida Retirement System as presently administered violates Title VII or the Constitution of the United States.

## NINETEENTH DEFENSE

51. The individual defendants are not liable for monetary damages under 42 USC § 1983 inasmuch as plaintiffs are proceeding against said defendants only in their representative capacities under the theory of *repondeat superior*, which theory provides no basis for relief under § 1983.

[Jurat & Certificate of Service Omitted]

---

[1]

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

HUGHLAN LONG, et al.,

Plaintiffs,

VS.

TCA 82-1056-WS

STATE OF FLORIDA, et al.,

### Defendants.

## VOLUME I

TRANSCRIPT OF FIRST DAY OF IMPACT  
HEARING

The above-entitled matter came on to be heard before the Honorable WILLIAM STAFFORD, Chief United States District Judge, in the United States Courthouse, Tallahassee, Florida, on the 3rd day of February, 1986, commencing at 9:17 a.m.

[2]

**APPEARANCES:**

**For the Plaintiffs:      WOODROW "MAC" MELVIN, JR.,  
KEITH OLIN and  
CINDY NIAD-HANNAH  
Attorneys at Law  
Ruden, Barnett, McClosky,  
Schuster & Russell  
One Biscayne Tower  
Suite 2020  
Two South Biscayne Boulevard  
Miami, Florida 33131**

-and-

GERALD FEUER

**Attorney at Law  
Biscayne Building  
19 West Flagler Street  
Miami, Florida 33130**

-and-

DAVID POPER

**Attorney at Law  
New World Tower  
Suite 1100  
100 Biscayne Boulevard, North  
Miami, Florida 33132**

-and-

DAVID KERNS

**Attorney at Law**  
**418 Vinnedge Ride**  
**Tallahassee, Florida 32303**

-and-

D. L. MIDDLEBROOKS

**Attorney at Law**  
**Post Office Box 12308**  
**Pensacola, Florida 32581**

[3]

**APPEARANCES: (Continued)**

**For the Defendants: DOUGLAS A. MANG,  
CHARLES T. COLLETTE and  
GARY J. ANTON  
Attorneys at Law  
Mang & Stowell  
Post Office Box 1019  
Tallahassee, Florida 32302**

-and-

AUGUSTUS D. AIKENS  
General Counsel  
Florida Department of  
Administration  
435 Carlton Building  
Tallahassee, Florida 32301

• • •

[74]

NEVIN G. SMITH was called as a witness for the Defendants,

• • •

# DIRECT EXAMINATION

BY MR. ANTON:

• • •

Q. And were you the Secretary of the Division of Administration at some point?

A. Of the Department of Administration, yes, sir.

Q. Excuse me. Yes. Were you the Secretary of the DOA?

A. I went there as Assistant Secretary in January of 1979, became Secretary in July and remained the Secretary up until January of 1985.

• • •

[78]

Q. Were you aware of the position that the state actuary was taking; the state actuary being Lawrence Gibney?

A. Through the Division Director, Mr. McMullian, I was. I don't know that Mr. Gibney and I ever had an

individual conversation on it because it was not likely or typical in the day-to-day operation of the Department that I came in contact with Mr. Gibney, but I was aware of Mr. McMullian getting advice from Mr. Gibney.

Q. Okay. What in your understanding was the position being taken by Mr. Gibney?

A. That we needed to prepare for the eventuality and that not only we needed to prepare, but rather the industry needed to prepare for the eventuality that sooner or later sex distinct actuarial tables would not be allowed to be used in insurance, retirement or annuities or any other area that actuaries practiced in.

• • •

[81]

Q. Now, Mr. Smith, during your tenure as the Secretary of Administration, were you aware of any charges of discrimination that had been filed with various governmental agencies pertaining to the State's use of the sex distinct actuarial table in the Florida Retirement System?

A. Yes, there were two.

MR. ANTON: Your Honor, may I approach the witness?

THE COURT: Sure.

BY MR. ANTON:

Q. Mr. Smith, I show you what's been identified as Defendants' Exhibit No. 1, it's a letter dated October 30, 1978, to Mr. Robert Kennedy from John E. Tolbert of the Department of Health, Education and Welfare office of



civil rights, and ask you if you are aware or if you have seen that letter?

A. I did not—was not there to receive that letter when it came in, but that letter was later attached to information that we supplied the Florida Legislature.

Q. Okay. And what is the nature of that letter?

A. The nature of that letter is that notification that a complaint under Title IX has been made against the Retirement System.

Q. I hand you what's been marked for identification as Defendants' Exhibit No. 2, a letter dated November 29, 1978 from Mr. Robert—to Mr. Robert Kennedy from Mr. Tolbert,

[82]

again, and ask you if you can identify that exhibit?

A. That exhibit was also attached to some information I provided to the Legislature. Again, I wasn't there at the point in time that this letter arrived in the agency, and it is the same thing that—it indicates that charges have been filed against the Retirement System.

Q. And is that a second charge?

A. Yes.

Q. Under Title IX.

A. Yes.

Q. Now, were you made aware of those charges during your tenure?

A. Yes.

Q. Do you know how those charges were resolved?

A. They were resolved—I don't know the technical term for the resolution of the charges, but essentially the charges were dismissed and found to be groundless. We were told to go on and proceed doing what we were doing.

• • •

[84]

Q. I hand you what's been identified as Defendants' Exhibit No. 5, a letter dated November 16, 1979 to Mr. Kennedy from William H. Thomas, the Office of Civil Rights, Department of HEW, and ask you if you can identify that exhibit?

(Pause)

A. Yes, that's the letter that essentially that there had been no violation of Title IX, and that the earlier charges against the Retirement System were dismissed. That was eventually sent along to the Legislature in order to update them on what was going on. We were attempting to keep them informed on the progress of any changes in the Retirement System, not just on this issue, but on all issues that affected the Retirement System.

Q. Okay. And that letter essentially found that the State Retirement System, at least for the purposes of Title IX, was

[85]

not discriminatory in its use of sex-based actuarial tables?

A. Yes.

• • •

[97]

Q. Now, Mr. Smith, were you also involved in the legislative changes to the Retirement System, I believe Chapter 121 and Chapter 112, Florida Statutes, which occurred in 1984?

A. Yes.

Q. How were you involved in those legislative changes?

A. They—they eventually would have had to receive policy approval from my office for the Division to be involved in them at all.

Q. Were you aware that the Legislature was considering adopting contribution rates in excess of that which was suggested by the State's consulting actuaries, Tillinghast, Nelson and Warren?

A. Very much so.

. . .

[99]

Q. Mr. Smith, I will hand you what's been identified as Defendants' Exhibit No. 12, performance audit of 1983, actuarial valuation on the Florida Retirement System, dated April 17, 1984, and ask you if you will—are familiar with that report?

A. Yes, sir. It was my responsibility as the Secretary of the Department of Administration to respond to this report in my official capacity.

Q. Did you respond to that report, Mr. Smith?

A. Yes, sir, I did.

Q. What was the nature of your response to that report?

A. It was my opinion that the auditor general was, once again, as they had done in previous actuarial valuations, telling the Legislature that the Department and its actuaries have not been conservative enough in their projections of the unfunded liability for the actuarial system.

Q. Specifically, Mr. Smith, I refer you to Page 29 of the report, Paragraph 90, and ask you if you are familiar with the recommendation made by the auditor general that an additional percentage point be added to the contribution rate by the

[100]

Legislature?

A. Yes, sir. I debated that issue both in this report and in a preceding actuarial valuation with the auditor general staff in front of the Legislature.

. . .

Q. What was the recommendation in the auditor general's report?

. . .

MR. MELVIN: Objection.

. . .

[101]

THE COURT: I think he can give me some background maybe where this recommendation is coming from.

Go ahead, Mr. Smith.

A. The system is a relatively young system in that the experience has been varying, the actuaries have not been able to pin the experience down tightly. Every year when the Florida—when the Department of Administration goes through and sets these assumptions and gives them to the actuary, the process is such that once the actuary gets done with their work, there is an additional safeguard built in. That safeguard is for the auditor general to then come back and criticize, as best they can, see how conservative we have been, whether the Department of Administration had done a good job, rather than just have the Legislature take it at face value.

THE COURT: You're not suggesting this is like a moot court competition, that we do it just to keep everybody sharp?

THE WITNESS: No, sir.

[102]

THE COURT: Okay.

THE WITNESS: It's to give the Legislature two opinions.

THE COURT: Okay.

THE WITNESS: It's to give—it's to prevent any single office from making an error or manipulating the system inappropriately. But it in fact is an adversarial relationship between the Department and the auditor. The auditor is going to be attempting to find as many errors in the system as they can, because that is precisely what they are paid to do, and I would encourage them to do so.

THE COURT: Well, that—

THE WITNESS: This particular finding says—

THE COURT: Go ahead.

THE WITNESS: —that because the—

THE COURT: How about reading it to me? What's it say?

. . .

THE WITNESS: "In audit report No. 9852, we recommend that the Legislature adopt a funding method that would prevent the balance of the unfunded accrued liability from growing.

[103]

However, due to increases in the unfunded accrued liability since 1980 from \$4.3 billion to \$6.4 billion, we believe the high initial cost of implementing this recommendation, \$211 million, may be unacceptable to the Legislature. Therefore, we recommend that the Legislature adopt a contribution rate that is a least one percent higher than the rate proposed by the Division's consulting actuaries. Implementing this one percent contribution rate increase will cost approximately \$65 million in fiscal year 1984-85. The State's share for its employees will be approximately \$17 million."

. . .

BY MR. ANTON:

Q. Mr. Smith, I hand you what's been identified as Defendants' Exhibit No. 13, a letter dated July 10, 1984 from you to Mr. Ellison, and ask you if you can identify that exhibit for me, please?

THE COURT: Now, let me see if I understand. You get a preliminary draft of what the auditor general



is going to publish as his report, and you have a certain amount of time as agency head to respond to that, and then your response becomes part of the official audit report? Is that how it still works?

[104]

THE WITNESS: It's supposed to work that way. It didn't in this particular case. He published his before he gave it to me, as I recall.

THE COURT: I see. But in any event is your response part of the—?

THE WITNESS: Eventually it does become one, yes. And, yes, this is my response.

. . .

THE WITNESS: Okay. Point No. 3 in my letter discusses the unfunded actuarial liability specifically and the percentage of payroll method and what they have done.

BY MR. ANTON:

. . .

Q. What is your specific response to that paragraph? And I believe it's on the last page of your letter, Mr. Smith.

. . .

[105]

THE COURT: Go ahead. Can you read it? Go ahead.

THE WITNESS: "As to the other subjects commented on in your review, you will note that most of your

concerns we addressed by the 1984 Legislature with the passage of Senate Bill 153, Section 3 and Section 4—" it addressed a number of things that I didn't read off to you—"Chapter 84-266, Laws of Florida. Obviously, we intend to comply with these amendments to the FRS law, Section 121.021(24) and Section 121.031(3) and (4), Florida Statutes. See enclosed copy of this legislation."

BY MR. ANTON:

Q. Has the legislation adopted in the '84 session increased contribution rates?

A. Yes, they did.

. . .

[107]

Q. Mr. Smith, to your knowledge, how was that additional money handled when they started coming into the trust fund in October of 1984?

A. It was placed in the trust as normal retirement contributions and it was put in the portion of the trust designed to pay off the unfunded liability.

Q. Was there any mention in the auditor general's report of the potential liability arising out of this particular

[108]

lawsuit?

A. No.

Q. Was there any mention in the 1983 valuation by the State's consulting actuaries of any potential liability arising out of this lawsuit?

A. No.

Q. To your knowledge, did any of the Legislators during your meetings and conferences with them ever ask you about the potential liabilities arising out of this lawsuit?

A. No.

. . .

Q. Now, the system changed in August—August 1st, 1983, correct?

A. That's correct.

Q. Why did you change as of August 1, 1983 to unisex?

A. My general counsel at the time told me that we had to make such a change.

Q. Did this lawsuit have anything to do with it?

A. No.

. . .

[109]

#### CROSS-EXAMINATION

BY MR. MELVIN:

. . .

[113]

Q. When if ever did you first become aware of an opinion formed about November 29th, 1978 by Mr. Gibney to the following effect about options, he says, "Although the facts of the case dealt with the defined contribution plan, the extension of the Court's action could inevitably lead to the

[114]

abolition of sex segregated tables in determining equivalent benefits when an election of an option is permitted?" When if ever did you learn that back in '78 Mr. Gibney held such a concern?

A. I was never aware that he held such concern in '78. Some time between the time I took the job that I took in 1979 and when we started to go to the Legislature, I was aware that the Division was concerned in general about Manhart and that it was an issue that needed to be addressed. What Mr. Gibney's specific concerns were or weren't I don't have any recollection of.

. . .

[129]

Q. Now, it is correct, isn't it, and I'm going to show you Retirement Bulletin, Volume X, No. 1 of the Florida Retirement System's bulletin, September 1984, subject: 1984 retirement legislation.

A. Okay.

Q. I direct your attention to the fourth page, I believe, of that and specifically to Table 2 at the bottom of that page. And the question is: Isn't it true that whatever UAAL

[130]

means, that in that publication the legislative act was described to the members of the fund as being—may I see this? As being, "The 1984 Legislature adopted rates .25 percent greater than those proposed above to guard against unexpected increases in the UAAL?" Do we agree that's what this bulletin advised the participating members of the plan that the Legislature had done when it passed those initial 24, 25 base points, right?

A. Are you asking me if what you just read is what that says?

Q. Isn't this exactly the information that went to the plan members in September of '84?

A. This says, "The 1984 Legislature adopted rates .25 percent greater than those proposed above to guard against unexpected increases in the UAAL." Yes, that's what that says.

. . .

[134]

Q. It's your opinion that the Legislature is required to do this every time the actuaries tell them that they must?

A. It's my opinion that the Constitution requires the Legislature to actuarially fund the system, and when the actuaries tell them that that is the case, assuming that there is no particular problem on the part of the Auditor General and they have such a signal clear, they are duty-bound to change the funding for the system or change the benefits for the system so it comes in line with the funding, one or the other.

. . .

[135]

Q. I see. Is it also your opinion that the Legislature isn't permitted to make an increase in that contribution rate unless the request for it comes from some actuary?

A. No, that is not correct.

Q. You do agree that a member of the House or the Senate might initiate such a proposition for reasons that as an elected official he thought was sufficient, right?

A. They can fund it at any amount above that required by the actuaries.

. . .

Q. Do you know that the amount of money, they \$200 million sought in this case is at least less than the total volume of those additional base points?

A. No, I don't know that.

Q. Do you agree that if they are less than—okay?

Assume

[136]

that for a moment, that they are less than.

A. All right.

Q. Do you agree that if they are less than, if the \$200 million is less than the amount of money provided by that 24 point increase in base points, and if the actuarial assumptions on which the plans is being administered are essentially sound, meaning that whatever errors they have in them tend to offset each other and work out approximately to a net even result, that the plan is in a position to pay the \$200 million judgment in this case and not be impacted?

A. Without modifying the contribution rates?

. . .

Q. Yes, without any modification in the contribution rate, other than what I have already included in the question.

. . .



[137]

THE WITNESS: — it would be—I think I would be bordering on an abuse of process if I did not separately, given the Legislature's action and what I know about them, identify the \$200 million as a current debt to the system, and add that in as a separable item, identify it in my next actuarial study as a separable item, and then take the existing contribution rates, the experiences, the unfunded liability, and show those as separable items, so that when I got done, my actuaries could deal with the problem each in the main.

If I threw the \$200 million into the unfunded liability, just threw a court decision against the system, irrespective of what caused the liability, I would perform an

[138]

act of essentially hiding the reason why it occurred within—

BY MR. MELVIN:

Q. The reason why —?

A. Within experience rates—

THE COURT: You asked the question. Let him answer.

MR. MELVIN: All right, sir.

A. — within experience rates such that I would lose an audit trail against the experience of the unfunded liability. In other words, the unfunded liability moves year to year as the actuaries do their study, and it's very important to keep that very clean figure as people live

longer or their salaries are higher or as it grows or diminishes. And a court judgment in the amount of \$200 million isn't something that would be normal, relative to that unfunded liability. And consequently I would have to show that and disclose it separately, and I would have to account for it separately in the actuarial rates. They would have to fund it some other way by raising the rates sufficiently to—if we are talking about \$200 million in current-day dollars, they would have to account for it sufficiently, given the current state of the law, to raise the rates by however many basis points or by whatever percent was required in order to fund over a 15-year period of time, which is what the Auditor General has got to change to, that \$200 million, that would be over and above, in my opinion, what is currently being funded in the

[139]

system.

BY MR. MELVIN:

Q. Well, I'm not sure I understand that, but let me ask this question. Let's just pretend that you went to the Legislature with that sort of an explanation and that you were asked a question: Mr. Smith, a couple years ago we added 24 base points to the unfunded accrued actuarial liability provision in the contribution rates, we added 24 base points, and we think that's worth about 3- or \$350 million, and we said it was for unexpected increases in that debt. Why haven't you thought about using those prior funds for the payment of this new judgment? What would you say?

A. The history of the unfunded liability in the Auditor General's opinion and in the actual facts in the actuary's statement has been that it has been growing, it has

been growing because the auditors, yours and the others that will testify later will tell you that the Florida Retirement System is a relatively new system. The newer the system, the greater the variation for change.

The Legislature's fear is that because of the newness of the system and the unpredictability of the system and actuaries' inability to predict it—

MR. MELVIN: May I object and move to strike what the Legislature's fear is?

THE COURT: Go ahead, Mr. Smith.

• • •

[140]

A. The Legislature's fear is that the system is liable to grow in such a way that future taxpayers are going to have to pay off an enormous burden that they have not been conservative enough with. The history of the system has been that the unfunded actuarial liability has in fact grown every time we have done an actuarial statement, and they are afraid of future growth. That money wouldn't be used, in my opinion, and I wouldn't request them to use it, in my opinion, okay, because I don't believe they put it there for that purpose. And the reason I would be back in front of them asking for new money would be because of my interpretation that in fact new money was what was required from a new Legislature in order

[141]

to fund it. Now, they could fund it any way they wanted to, but that would be what I would do if I was Secretary of Administration facing this kind of a judgment.

• • •

• • •

[146]

DAVID V. KERNS

was called as a witness for Defendants,

• • •

[157]

CROSS-EXAMINATION

BY MR. MELVIN:

• • •

[163]

Q. Did you realize that the wait-and-see attitude that you have described might carry with it the problem that as you wait and see more and more people retire with vested benefits to terminated employee, and that if the State found later that it could not reduce female benefit levels for the terminated female retirees, then it might be in a position where in order to equalize discriminated females—discriminated males, you would be accruing a liability, you would have to pay a retroactive past liability going back, say, to the date of Manhart? Did the thought of that occur to you?

A. I did not consider Manhart as sufficiently a directive to start at that point in my—it was my judgment that we would get some directive from a competent authority, legislative or judicial, and we would then comply.

• • •

---

[171]

ANDREW JACKSON McMULLIAN, III  
was called a witness for the Defendants,

• • •

# DIRECT EXAMINATION

BY MR. ANTON:

Q. Mr. McMullian, where do you reside?

A. 1121 Rosewood Drive, Tallahassee, Florida, zip is 32301.

Q. And where are you employed?

A. State of Florida, Department of Administration, Division of Retirement.

Q. In what capacity?

A. I'm the State Retirement Director.

Q. How long have you been employed as the State Retirement

[172]

Director?

A. A little better than six years, having been appointed October 1, 1979.

Q. Prior to that time, in what capacity did you serve?

A. I served as Assistant Director of Retirement from April 1 of '79 until October 1 of '79.

Q. Okay. Can you please describe for the Court some of your responsibilities as the Director of the Division of Retirement?

A. Yes, sir. As the State Retirement Director heading up the Division of Retirement, it's my responsibility to direct the administration of the Florida Retirement System, which is a statewide consolidated retirement system encompassing all State employees, State agencies, university systems, community colleges, all the county agencies and employees, and the district school boards and their employees. All those are compulsion members of the Florida Retirement System. Also by election we have a little over a hundred cities and approximately 300 special districts that are in the system. All together better than 418,000 active members and currently 84,000-plus retired members. It's my responsibility to be knowledgeable of the requirements of the law and to see that these provisions in the law are properly applied to all active and retiring members of the system relative to their retirement benefits.

[173]

Q. Do you have a legal staff for that purpose?

A. Yes, I do. We have a legal office in the Division consisting of three attorneys, one is the Administrative Supervisory Attorney, and we have two Junior Attorneys.

THE COURT: Let me ask you before I forget. Within the system, are the university faculty and staff, are they included in your—as part of the 418,000?

THE WITNESS: Yes, sir, Your Honor. However, legislation was passed in 1984 that did provide for an option retirement program for faculty and certain administrative and professional personnel of the university system, so we do have some of the faculty who have opted



out of the Florida Retirement System for a preference to participate in this new option retirement program.

THE COURT: But at the time we are talking about

THE WITNESS: Yes, sir, all.

THE COURT: — '78?

THE WITNESS: Yes, they were all compulsory members of the Florida Retirement System.

THE COURT: People at Florida State College for Women, University of Florida, all over the state, they were part of this either active or retired members of the FRS, right?

THE WITNESS: Yes, sir.

THE COURT: Thank you, sir.

[174]

Excuse me, Mr. Anton.

MR. ANTON: Yes, sir.

BY MR. ANTON:

Q. Mr. McMullian, could you please give the Court a very brief description of the Florida Retirement System, how it operates specifically relative to benefits?

A. Relative benefit provisions?

Q. Yes, sir.

A. Well, the system consists of three classes of membership: Regular class, special risk class, and elected State officer class. Ninety-five percent of all the active

members participate in a regular class. Approximately 25,000 members are members of the special risk class in that they are employed in law enforcement, fire fighting or correctional officer work. And we probably have somewhere in the neighborhood of 2,000 to 2,500 members of the elected State officer class, that's all of your State constitutional officers and county elected constitutional officers.

Q. Okay. You indicated earlier there are approximately 400,000 people participating or covered by the plan.

THE COURT: Four hundred eighteen, wasn't it?

THE WITNESS: Yes, sir.

BY MR. ANTON:

Q. Four hundred eighteen. And 95 percent of those are within the regular class?

[175]

A. Yes, sir.

. . .

[176]

Q. There are four basic benefit options under the Florida Retirement System. Would you briefly explain to the Court how each operates?

A. I think so. Option I is our base benefit, that's the one that is unisex. And all things being equal, male and female members serving the same period of time in service

[177]

earning the same salary upon retirement choosing Option I would receive the same identical monthly benefit pay-out.

Q. Now, that has always been the case, has it not?

A. That has always been the case.

Now, those members have a choice at time of retirement of taking Option I which is guaranteed life annuity, or they can choose either Options II, III or IV, which, in effect, they can cash in and take the actual equivalent of their Option I. Option II is a guaranteed ten year's pay which means as long as you live, if you live more than ten years or you're as old as Methuselah, you still draw Option II. But if you die within the first ten years of retirement date, the remainder of that time until ten years have passed, a pay-out would be made to whomever the retiring member named as his beneficiary. So it's a guaranteed ten-year pay-out under Option II.

THE COURT: But if—if the retired employee died in the eleventh year, his or her beneficiary would not receive a dime after that?

THE WITNESS: That's right, Your Honor, because ten-year guaranteed payment period would have run.

THE COURT: But, as you say, the retired employee would continue to get—?

THE WITNESS: As long as he lives.

THE COURT: As long as he or she lives?

[178]

THE WITNESS: Right.

THE COURT: Okay. Thank you.

A. Option III is actually the actuarial equivalent to Option I, but it's there to provide a continuing annuity as your spouse or dependent, referred to as your joint annuitant. And that pay-out is for the member as long as he or she lives, and upon death the same monthly dollar amount will be paid to the surviving spouse or joint annuitant for as long as he or she lives.

Option IV is a variation of that, except that it pays a little more than Option III at the time of retirement, but upon the death of either the member who retired or the joint annuitant, doesn't matter who dies first, whichever, in the case of either one dying, that Option IV benefit is reduced by one-third and is continued to be paid at 66-and-two-thirds percent to the surviving person, be it the member or the surviving spouse, joint annuitant. Those are the four options.

BY MR. ANTON:

Q. Now, you said you have approximately 1,100 employer participants?

A. Yes, sir, at all levels of government.

Q. And that 1,100 does not include, or does that include the various state participants?

A. It does include the various state—.

[179]

Q. Does not?

A. It does include the various state agencies.

Q. Does.

Once a person joins or an employer joins, is that irrevocable?

A. That is right. Only the municipalities and the special districts have the provision in the law to elect coverage, but once they elect coverage it is irrevocable.

Q. How many cities participate?

A. Approximately a hundred and five.

Q. How many of the counties?

A. Well, all 67 counties, but there are probably eight, ten, twelve different autonomous entities in each county, so you've got quite a number of independent public employers in the 67 counties that do participate.

Q. And they require that it's compulsory for the counties?

A. Yes.

Q. Does that include school boards?

A. School boards are compulsory members, all 67 district school boards.

THE COURT: County commissioners?

THE WITNESS: Yes, sir.

BY MR. ANTON:

Q. Clerks of Court?

A. Yes, sir.

[180]

Q. All the various constitutional officers?

A. Yes.

Q. They are required to participate in the FRS?

A. Right. I believe the county officials have an option to—within a year to opt out, and also the legislators have that same option, but otherwise it's compulsory. If they don't exercise that option, it becomes compulsory.

Q. Special districts are also included within FRS?

A. They have the option to join.

Q. Okay. And how many special districts are presently participating?

A. Approximately 300.

Q. What type of special districts does that encompass?

A. Fire control, flood control, water management districts, housing authorities, hospital districts, port authorities, libraries. It runs the gamut. Anything that you can legally set up a special district for, that special district is eligible to join the Florida Retirement System.

Q. What percentage of the employer participants do the school boards comprise?

A. Approximately 45 percent of the membership is composed of the 67 district school board employees.

THE COURT: 45 percent? Excuse me.

MR. ANTON: 45 percent.

THE COURT: 45 percent of 418,000?

[181]



THE WITNESS: Yes, sir, Your Honor, which would approximately come to a hundred seventy-five thousand members, somewhere in that neighborhood.

BY MR. ANTON:

Q. All right. Could you please describe to the Court how the Florida Retirement System funds its benefits?

A. Yes. The cost of funding the Florida Retirement System is done through a payroll contribution rate which is adjusted periodically as required by law, and we do an actuarial valuation which we are not required to do every two years, and the contribution rate is paid by the employer. The Florida Retirement System has been an employee not contributory system since 1975. So the rate of payroll currently for regular members, an example is 12.24 percent of payroll.

. . .

[185]

Q. Who sets that rate, Mr. McMullian?

A. The Florida Legislature, based upon recommendations from the Department of Administration, our consulting actuary, and advice and counsel overview by the Auditor General, State of Florida.

Q. Does the Division have the authority to set the rate?

A. No, sir.

Q. Can the individual participants set the rate?

A. No.

Q. Are you familiar with constitutional provision Article 10, Section 14, Florida Constitution?

A. Yes.

Q. Pertaining to the Florida Retirement System?

A. Yes, sir.

Q. And retirement system in general?

[186]

A. Yes.

Q. In your understanding, what does that require?

A. It requires that any and all public pension plans or systems that are funded in part or in whole by public funds shall not promise or provide retirement benefits that are not prefunded or, if you will, concurrently funded on an actuarially sound basis; paraphrasing that pretty much the way the Constitution reads.

Q. That means it's not—the Florida Retirement System is not a pay-as-you-go like the Social Security using present income to pay for?

A. That is correct.

Q. Present benefits.

A. We are prohibited by the Constitution and by statutes from funding the Retirement System that way.

Q. Now, you're familiar with the actuarial factors that the Florida Retirement System has used in the past?

A. Yes, sir.

Q. And prior to August 1, 1983 the system used sex district actuarial factors?

A. That's correct.

Q. Mr. McMullian, do you know whether those factors were the same factors that were used in the industry, private sector?

A. That is my understanding; yes, sir.

[187]

Q. To your knowledge, had the Florida Retirement System developed its own set of retirement factors?

A. No, sir.

Q. Or actuarial factors?

A. No.

. . .

[192]

Q. Now, were you aware of the memorandum that had been prepared by Samantha Boge, another attorney working in the Department of Administration?

A. I became aware of her memorandum very shortly after it was written, I believe. As I recall, it was written September 1 of '81, and we had our meeting with Secretary Smith September 4 of '81, so within a period of three or four days there I became aware of her memorandum. I'm not sure that I saw it before the meeting or sometime thereafter, but I was made aware, in talking with my counsel, Mr. Aikens, and with General Counsel of the Department, Mr. Kerns, that Ms. Boge had written such a memorandum.

. . .

[198]

Q. What was your involvement and your role with the Legislature with respect to matters pertaining to the Division of Retirement?

A. Well, as Director of the Division, I was the spokesperson and was responsible for presenting any legislation that might affect or speak to legislation that might affect the Florida Retirement System. Any amendments that were proposed in bill form, it was my duty to appear before the appropriate committees and the House and the Senate and speak clearly to the issues of the amendments that were being proposed to the Legislature.

Q. Is it fair to say that you served as the Secretary's

[199]

legislative liaison?

A. Yes, sir.

Q. Now, were you involved in the 1984 legislative session?

A. I was.

Q. And particularly those issues involving the Division of Retirement?

A. Yes.

Q. And would you please describe your involvement in the '84 session?

. . .

A. I was very involved, and that was one of the most active and trying sessions that I have had as a—as the Retirement Director the last six years.

Q. Why is that?

A. There were many issues before the Legislature. But it happened to be the year that we presented the '83 evaluation of the Florida Retirement System, and it happened to be the year that the Auditor General was very critical of the assumptions that we had chosen to use, pointing out that—to the Legislature that those assumptions appear to be too optimistic and that we were not conservative enough in our projection of our liabilities. And so that brought about quite a debate, and I was involved in those debates.

[200]

Q. Were you familiar with the performance audit report—

A. Yes.

Q. —of the Auditor General which was completed in April of 1984?

A. Yes, I am.

. . .

Q. Mr. McMullian, I hand you what's been received in evidence as Defendants' Exhibit No. 12, it's the performance audit of 1983, actuarial valuation, Florida Retirement System. Are you familiar with the Auditor General's discussion of the growth of what's been identified as the UAAL?

A. Very familiar, yes.

Q. Do you have a layman's term for that?

A. For his concern or for the term?

Q. For the UAAL.

A. It's past service debt that wasn't paid for when it should have been, it was not properly funded. The main reason it's there today is that it was not until the constitutional amendment in 1977 that the Florida Legislature began to actuarially fund the Retirement System, and that was started in '78.

Q. What was the result of the State not actuarially funding, as you stated, the Retirement System prior to 1977?

[201]

A. I'm not sure I understand your question. What caused it, or—you said what was the result?

Q. What was the result?

A. The result was that the Legislature responded to the Department's recommendations and to the consulting actuaries' recommendations and acted on the recommended rates that needed to be put in place to actuarially fund the system on an actuarially sound basis over a projected period of 30 years, amortizing that debt pretty much as you would a house mortgage with principal and interest.

Q. In the 1984 Auditor General's report, was there a discussion regarding the amount of the growth of the UAAL, the unfunded debt?

A. Starting when, Counsel?

Q. I believe—is there a description—?

MR. ANTON: If I may, Your Honor?

(Discussion off the record)



BY MR. ANTON:

Q. If you could, Mr. McMullian, find that section describing the growth of the UAAL.

A. I can do it without finding it, Counsel. When the '77 valuation was completed, there was a past service debt or a UAAL of about \$3.5 billion.

THE COURT: 3.5 billion, that's B?

THE WITNESS: Yes, sir.

[202]

THE COURT: Okay.

A. And then three years later when the 1980 valuation was completed, that debt had increased to 4.3 billion; and then in 1983 when the valuation was completed, which the '84 Legislature was looking at, that debt had grown to nearly six-and-a-half billion, 6.4-plus billion.

Now, that didn't surprise us in the Department or our actuaries because that's how the plan had been perfected or built to amortize and pay off this debt over a period of 30 years. We knew that until the year approximately 1995 that that debt would continue to grow and top out somewhere approximately around nine billion.

BY MR. ANTON:

Q. Nine billion?

A. (Nodded affirmatively) But, if it please the Court, I think I might need to give you a little background about the role of the Auditor General. The Auditor General did not have overview responsibility until 1979. There was an

amendment passed to Chapter 112, Part VII of the Florida Statutes, known as the Florida Protection of the Public Employee Benefits Act. That Act named the Division of Retirement as the overbearing monitoring agency for all local pension plans. And obviously since they couldn't name the Division to amortize its own division operation, the law named the Auditor Division to monitor the Division of

[203]

Retirement's work at the State level. So the Auditor General did not have that responsibility until '79, and it was not until the '80 valuation was completed in the early spring of '81 that it made its first critique of the Florida Retirement System valuation. And at that point the Auditor General expressed great concern that there was any funding methodology at all being used that would allow that past service debt continue to grow, and was very critical of that and suggested to the Legislature that it be capped and stopped right there and not let it grow. But the '81 Legislature chose not to do that because the decision to fund the system the way it is funded through payroll growth methodology was a joint decision reached by both the Legislature and the executive back in '77. So the Legislature chose to stay on that course of action in '81, notwithstanding the Auditor General's critique and recommendation, strong recommendation, that UAAL be capped and not allowed to grow.

So if you have that background, you can understand where the Auditor General was coming from in the 1983 valuation and its presentation to the '84 Legislature. The Auditor General saw that UAAL growing from 3.5 billion

to—or 4.3 billion to 6.4 billion, and at that point made strong recommendations to the Legislature that if our assumptions were too optimistic and we missed the mark, then the system could be in trouble, and therefore the recommendation that the

[204]

one percent additional increase across the board be put on the rates recommended by the consulting actuary. That was debated in committee. I took part in those debates. The House Committee on Retirement and Personnel recommended the one percent across-the-board increase that the Auditor General had recommended. The House Appropriations Committee said it couldn't do that, they met them halfway and met one-half of one percent, 50 basis points, when it went over to the Senate. The Senate said we will meet you, one-fourth of one percent, if you will, 25 basis points. And that's the legislative process. Your Honor.

THE COURT: I'm not unfamiliar with it.

(Laughter)

THE COURT: All right.

A. There was nothing in that debate that referred to the Hughlan Long case, and the 24 basis points that wound up in question here today was to pay off the unfunded past service debt sooner than was projected in our actuarial report.

• • •

[205]

BY MR. ANTON:

Q. How has the Division used the additional money that has come in from this 24-basis-point increase?

A. It clearly is earmarked to pay off the past service debt, the UAAL, earlier or sooner than was projected by the valuation report presented by Tillinghast.

• • •

[1]

[Caption Omitted In Printing]

## VOLUME II

### TRANSCRIPT OF SECOND DAY OF IMPACT HEARING

[February 4, 1986]

• • •

[2]

THE COURT: Good morning.

• • •

When we recessed last evening, Mr. McMullian was testifying on direct.

• • •

BY MR. ANTON:

Q. Mr. McMullian, when we recessed last night we were discussing the 25 basis points that had been added to the contribution rate by the 1984 Legislature. How has

the Division allocated the money that has come in from the 25 basis points?

A. Well, we have not treated it any different than the rest of the money coming in, as far as where it's deposited. It comes right on it and is deposited in the FRS trust fund and is immediately turned over to the State Board of Administration for investment, but it is earmarked for purposes of evaluation. All of that goes towards paying off past service debt over the UAAL. That was the express purpose that the Legislature appropriated that additional contribution.

[3]

Q. Mr. McMullian, has there been or has a contingency fund or a slush fund been created for purposes of this 25 basis points?

A. No, sir.

Q. Do you know how long the 25 basis point increase will be in effect?

A. No, sir. I can only tell you that it will be in effect until the next valuation is looked at by the Legislature which is an '85 evaluation now under preparation, and the '86 Legislature will have the '85 valuation under review this spring when it convenes.

As to whether the Legislature will continue those 25, 24 basis points, or whether they will increase it or reduce it, only the Legislature knows, because they will have before them a new valuation with new contribution rates predicated on the last valuation.

Q. Now, to your knowledge, was there any discussion or debate in the Legislature regarding this case with respect to the additional 25 basis points that were added to the contribution rate?

A. The case here in court today?

Q. This particular lawsuit.

A. No, sir.

Q. What other legislative changes were enacted by the 1984 session?

[4]

A. Well, there were a number of amendments to the Florida Retirement System Law, Chapter 121, that would require that the valuation process be handled a little differently in that we would be required to be a little more conservative in our approach to the valuation process, such as there were amendments requiring the assets to be valued based on a five-year running average as opposed to the current point in time, and that, of course, was to eliminate the flow in the marketplace and the economy. Also it went from 30 years down to 15 years in which the State would be required to pay off any additional actuarial losses that might accrue or surface. Prior to that amendment passing, actuarial losses were paid off and amortized over a 30-year period. This amendment would reduce that down to 15 which, in effect, would require whatever contribution rate might be increased or required to pay off that loss. This amendment would in effect require you to pay twice as much and reduce the time.

Q. Now, Mr. McMullian, if the Court in this litigation awarded damages to the class, either retroactive or



prospective, how would that liability be amortized by the Florida Retirement System; that is, over how many years?

A. Well, it would be a real loss to the fund, an actuarial loss, would have to be amortized over 15 years in accordance with the amended law in 1984.

. . .

[10]

Q. Mr. McMullian, what is the contribution rate now for most of the employers?

A. The regular class which makes up roughly 95 percent of the membership is currently 12.24, that's made up of two parts, 6.43 goes to pay normal costs, and 5.71 to pay off the unfunded accrued liability.

Q. Now, when you say 12.24 percent, that is the percentage of the payroll of the participating employers?

A. Yes.

Q. That's the percentage of payroll that they must pay into the Florida Retirement System?

A. For each salary dollar that the employer pays its employee, 12.24 is paid into the Florida Retirement System Trust Fund for retirement benefits earned.

[11]

Q. And 5.71 percent of that is?

A. Earmarked to pay off the past service debt, this unfunded actuarial accrued liability we've been talking about.

Q. And the balance is used just to cover the normal cost?

A. That's right. Another way of putting it is this: If the Florida Retirement System did not have a past service debt of six-and-a-half billion dollars at the last valuation, and when we see the '85 valuation, if you didn't have that past service debt to pay off, then current benefits, the current benefits structure that I explained to the Court in here yesterday, could be and would be paid for based on only 6.53 of payroll.

Q. Has the percentage of the contribution rates going to pay off the unfunded debt been increasing?

A. Yes, sir; it has the last three valuations.

Q. Do you know what the percentage of the contribution rate for paying off the debt was in 1977?

A. About 3.98, I think.

Q. How about 1980?

A. Four point something. I would say 4.58. Let me verify that.

(Pause)

4.52.

Q. In 1983?

A. 5.47, and the additional 24 basis points which were added to that brings it up to 5.71.

[12]

Q. Now, if this Court were to award either retroactive or prospective damages, you indicated that that would become part of the UAAL?

A. Yes, sir.

Q. The debt?

A. Yes, sir; that's my understanding.

Q. Would that have the effect of increasing the contribution rate percentage to pay off the unfunded debt?

A. Yes, it would.

. . .

[16]

Q. Mr. McMullian, I hand you what's been marked for identification as Defendants' Exhibit No. 20, it is the Florida Retire System 1940-'84 annual report, and ask you if you can identify that document?

A. Yes, sir. This is our annual report which we are required by law to produce each year.

Q. Does the report set forth the financial condition or at least the value of the assets of the Florida Retirement System?

A. Yes, it does.

Q. Now, what is the effective date of that report, Mr. McMullian?

A. This is June 30, 1984.

Q. Does the report reflect the value of the assets as of June 30th, 1984?

A. It does at 7.1 billion.

[17]

Q. And what were the liabilities of the Florida Retirement System as of that annual report?

A. Well, well over 13 billion. I would have to find the exact place, but when the valuation of '83 was completed, our liabilities were over 13 billion, and this was one year later.

(Discussion off the record)

BY MR. ANTON:

Q. I believe on Page 40 of the report, the actuarial report, does it have the figures?

A. Yes, sir. And this is dated July 1, '83. And I would like to call attention that we don't value our liabilities except when we do the valuation. So on an off-year when we don't have the valuation, we would not have those liabilities reported, and even though this is the June 30, '84 report, we are reporting liabilities established as of July 1, '83, a year earlier, based on the '83 valuation, and this is a little over \$13 billion.

Q. Based on your understanding of the Florida Retirement System, does it have—presently have sufficient assets to meet its anticipated liabilities?

A. No, sir, not in the bank at the present time.

Q. And an award of damages from this Court would be handled by the system in which manner?

A. It would be treated as a loss and handled in that manner by the consulting actuary, would be picked up in the next

[18]

valuation report and would have to be funded over a period of 15 years.

. . .

[21]

Q. Now, Mr. McMullian, the system changed to unisex tables in August 1, 1983, correct?

A. Yes, sir; that is correct.

• • •

Q. I hand you what's been marked for identification as Defendants' Exhibit No. 27, it's a memorandum No. 83-AA-88, excuse me, from yourself to all Florida Retirement System reporting units, and I ask if you can identify that document?

A. Yes, I can. It's the official notice that we sent out to all of the participating public employers under the Florida Retirement System putting all employers on notice that the State of Florida, Florida Retirement System, based on the July 26th U.S. Supreme Court ruling in Norris, that the Division was in the process of adopting actuarial tables based

[22]

on the unisex concept.

Q. Did the filing of this lawsuit have anything to do with the State's change from sex distinct to unisex tables?

A. No, sir.

MR. MELVIN: Objection, so far as the witness would purport to answer for anyone other than himself in making that decision.

THE COURT: Well, does this come as a result of a recommendation from your Division?

THE WITNESS: Yes, sir, based on Norris.

THE COURT: It was based on Norris, not on this lawsuit?

THE WITNESS: Yes, sir.

THE COURT: Okay. With that understanding, the objection is overruled.

• • •

[23]

Q. Now, Mr. McMullian, you are the custodian of the records for the Division of Retirement?

A. Yes.

Q. Are you familiar with the date that Plaintiff Hughian Long retired?

A. Yes, sir.

Q. What is the date of his retirement?

A. As I recall, July of 1982.

Q. And do you know which option Mr. Long retired under?

[24]

A. I believe he chose Option II.

Q. If I gave you the files, Mr. McMullian, could you identify that, the option retirement?

A. I could, yes.

(Pause)

Q. I hand you a box of material, Mr. McMullian, and ask you if you recognize those documents?



A. Yes, sir, I do.

Q. What are they?

A. They are the official retirement files of a number—of four different retirees, one being Mr. Hughlan Long.

Q. Under what option, if you can determine from those files, did Mr. Long retire under?

A. He did retire under Option II.

Q. Okay. And who was Mr. Long's employer at the time of his retirement?

A. State of Florida, the Department of Labor and Employment Security.

• • •

[25]

Q. Do you have the record pertaining to the charge of discrimination filed by Mr. Hughlan Long?

A. Yes, sir.

Q. Is that there in front of you?

A. It's here in this file.

• • •

Q. Are you also the custodian of the records pertaining to the charges of discrimination?

A. Yes, sir.

Q. Do you have a date on which Mr. Long filed his Title VII charge of discrimination?

A. October 7, 1981.

Q. And who were the Respondents named in the charge of discrimination, if you have that in front of you?

A. State of Florida, Department of Administration, Division of Retirement.

• • •

[29]

Q. Now, those documents are the complete records that the Division has with respect to the charge of discrimination filed by any of the Plaintiffs in this case?

A. Yes, that's all we have.

THE COURT: There are no others?

THE WITNESS: There are no others.

THE COURT: Okay.

BY MR. ANTON:

Q. Do you know the date on which Mr. Dewey Haas retired?

A. Yes, sir. He retired March 1st, 1981.

• • •

[30]

Q. Do your records reflect that Dewey Haas retired effective March 1, 1981?

A. Yes.

Q. And Mr. Haas elected the joint survivorship option under Option III?

A. Yes, sir.

Q. And records reflect that Mr. Haas was an employee of Metropolitan Dade County at the time of his retirement?

A. That is correct.

Q. Do you have a record at all of Mr. Haas having filed a charge of discrimination?

A. No, sir.

Q. Now, with respect to Mr. Rassler, Carl Rassler, his retirement was effective January 1, 1979?

A. That's correct.

Q. And Mr. Rassler elected a joint survivorship option under Option II?

A. Yes.

Q. And prior to his retirement, Mr. Rassler was an employee of the Hillsborough County School Board, Tampa, Florida?

A. Yes, sir.

. . .

[31]

Q. Now, with respect to the files and the charges of discrimination that you have in front of you, do they reflect anything prior to the amended charges filed by the Plaintiffs, other than Hughlan Long?

A. No, sir. The State of Florida and the Division of Retirement were never named by Rassler and Samaha as Defendants until we received the amended charges.

Q. Were you ever involved in an investigation by the EEOC into any of these charges of discrimination?

A. Yes, we were.

Q. By whom?

A. By the EEOC office out of Miami involving the Title IX complaints.

Q. Okay. With respect to these Title VII charges of discrimination—

A. No, sir.

Q. —filed by Mr. Long, Mr. Rassler, Mr. Samaha?

A. In regard to that, we never heard another word from anybody after we received the petition or the file or the complaint.

. . .

[32]

Q. When did Mr. Samaha retire, do your records reflect that?

A. Yes. He retired February 1979 under Option III retirement.

Q. And he was an employee of the Pinellas County Board of Public Instruction?

A. That's right.

. . .

[37]

## CROSS-EXAMINATION

BY MR. MELVIN:

• • •

[38]

Q. Right. And in connection with familiarizing yourself with your new job, I assume that you spotted the first of this controversy about Manhart; is that correct?

A. Somewhere soon after I was employed with the Division I became aware, it was brought to my attention that the Manhart case existed.

Q. All right, sir.

A. I don't recall when it first came to my attention. I may have read it in some trade journal or news letter or, you know, bulletin, and then I discussed it with staff on numerous occasions.

Q. All right. Would you agree with me that the issue presented by that case was one of the biggest events of interest to pension plan administrators that had come out of the courts in many, many, many years? Is that true?

A. I would have to say yes, it was of interest.

• • •

[39]

Q. Yes. Okay.

You agree, do you not, that in that five-year period of time a question existed with respect to the legality of the use of the sex-based mortality tables, a question

[40]

existed?

A. Yes, I think the whole industry was concerned about that.

Q. It's stating the matter moderately to say a question existed?

A. (Nodded affirmatively)

• • •

[43]

Q. All right, sir. I would like to address this question to Mr. McMullian personally as opposed to Mr. McMullian officially. Yesterday you made a comment that you were expressing an opinion that was personal and official. In that sense I want to make a distinction, and I want to ask you again this one personally, okay?

A. (Nodded affirmatively)

Q. It is your personal view of this question of using—this question of male versus female life expectancy that it is a biological fact of life, God ordained?

A. I believe I was quoted accurately in that respect, yes.

• • •

[46]

Q. So, in your opinion, if we assume, as you now do, for instance, that Norris precludes the current use of anything but a unisex table, you accept that as the rule of law in this country, but on a personal basis you would add the



fact that you still don't see any unfairness in the previous system?

A. That's been my position all along; yes, sir.

Q. Still is?

A. Yes, sir.

. . .

[55]

Q. All right. Now, not intending to make this sound petty at all, do you think \$200 million is too much and \$1 isn't significant? At what point in your judgment, based on what you know about the fund, would the size of the judgment reach a point where it did have a significant effect on the future benefits paid and operations of the pension plan?

A. I think I can help you, Mr. Melvin, and the Court, Your Honor. Whatever dollar amount equates to the need for one additional basis point to be assessed and charged our participating employers becomes significant.

. . .

[76]

Q. You would agree, would you not, Mr. McMullian, that if this Court imposes a \$200 million judgment on the fund, and if the Legislature reacts to that by passing additional base point contributions necessary to provide those \$200 million to the Florida Retirement System, then the net effect of this experience has been no impact?

A. No, sir, I don't.

Q. Explain under that circumstance how any impact possibly could occur, except the trouble going to the Legislature, and explain what your needs are.

A. Maybe I don't understand your question.

THE COURT: I'm not sure I do either.

BY MR. MELVIN:

Q. If the Court imposes a \$200 million judgment upon the fund, and if you report the result of that to the Legislature and the Legislature appropriates additional base points necessary to offer that amount of money, given those assumptions, the net effect of it is there has been no impact on the fund; is that true? The fund has been restored; isn't that true?

A. Well, no. There has been a tremendous financial impact on the fund which employers and taxpayers have to pay, but—

[77]

Q. Excuse me. On the fund or on the employers? Where did the impact occur there?

A. It first occurred on the fund.

Q. But then the employers through the Legislature came up with an increase in base points, gave the fund the missing \$200 million, under my assumptions?

A. Right.

Q. Okay. So at that point the fund has no impact, does it; the impact shifted to the employer totally, right?

A. Well, no, I can't agree to that.

. . .

[78]

Q. Mr. McMullian, I have marked Plaintiffs' Exhibit 14 for identification, a copy of a June 18, 1981 memorandum that apparently you authored and sent to Mr. Nevin Smith. Having in mind this question of who asked what lawyer if ever for a written legal opinion about Title VII obligations, may I draw your attention to a statement that begins in the sixth line from the bottom of Page 1? Look to the far right, you will see a sentence beginning with the word "consequently". Do you see that?

A. Yes, sir.

Q. Would you read what follows the word "consequently"?

A. Do you wish that I read it aloud?

Q. Yes, sir.

A. Do you want me to read the whole sentence?

Q. That entire sentence, yes.

A. "Consequently I have asked the legal staff to research this matter thoroughly and give us a written report and recommendation within the next 30 days."

Q. Okay. Now, do you know of any written report or

[79]

recommendation that's ever been received, except the Kiesling memorandum and the Boge memorandum?

A. No, there was not—none prepared.

• • •

[83]

# REDIRECT EXAMINATION

BY MR. ANTON:

Q. Mr. McMullian, when you—the Division and the Department changed to unisex in August of 1983, you made no change or award with those folks who had already retired, correct?

A. That is correct.

Q. Is the Division or the Department or the State permitted to reduce the benefits of anybody who is already retired?

A. No.

Q. Could you raise the benefits of anybody who had already retired without obtaining—

A. No.

Q. —legislative approval?

[84]

A. No, we could not. Retirement is a contract and it's already been so ordered in the court, and once it's done, it's done. Subject short of some other court order we have no authority to do anything.

• • •

[88]

Q. Now, Mr. McMullian, have you ever, as the—at least in the last three years, 1980 to 1983, have there been sufficient gains to the Florida Retirement System because they exceeded the assumptions such that you had a net gain to the Retirement System?

A. No. To the contrary. Even though the rate of return that we experienced, the real rate of return was higher than the assumption, we have had other experiences in the system that impacted on other assumptions that caused a loss.

Q. So even though you may have had a net gain in the interest that you anticipated, you suffered other losses, experienced losses which caused a net loss to the system?

A. For an example, on rate of withdrawal or your turnover rate, we have experienced people staying on longer than we anticipated, more people staying to vest than had been anticipated, so that runs our costs up. Mortality, we have

[89]

experienced our retired members longer than the mortality tables had projected and, therefore, we had to increase those the last time around by an additional two years. And then salaries in the system have run higher than we anticipated. So all those things tend to offset any gain that you would have otherwise realized had everything been stable and consistent and right on target, except the rate or return on investment which was a little higher than you anticipated.

. . .

[93]

#### RECROSS-EXAMINATION

BY MR. MELVIN:

. . .

[94]

Q. I just want to ask you a question about the degree of certainty that obtains to each one of these figures, okay? Is it correct that insofar as the retired people are concerned—well, let me back up.

It's correct, isn't it, that under the Florida Retirement System benefits are keyed to a prescribed formula, I think it's the statutory formula called average final compensation; is that right?

A. That's right. That's part of the formula for determining the benefit.

Q. All right.

A. Average final comp, yes, sir, years of service, and the value of those years of service would give you a percentage of that years of final comp.

Q. When you figure average final compensation, that's

[95]

something that happens when a person retires, right?

A. That is correct.

Q. And at that point the obligation of the plan to that person is absolutely known with only one loose end; the only thing you're not sure about is how long they might live, and for that purpose you are estimating it on a mortality table?

A. Correct.

. . .



[100]

MICHAEL J. TIERNEY

was called as a witness for the Defendants,

• • •

## DIRECT EXAMINATION

BY MR. ANTON:

Q. Mr. Tierney, where do you reside?

A. In Jacksonville, Florida.

Q. And how are you employed?

A. As a consulting actuary with Tillinghast, Nelson and Warren.

• • •

[105]

MR. ANTON: Your Honor, I would like to tender Mr. Tierney as an expert in the following areas: Pension systems, including their design and administration; pricing; funding and government regulations; actuarial concepts relating to pension systems; the actuarial valuation of the assets, liabilities and actuary plans of pension systems in general, the Florida Retirement System in particular; the actuarial evaluation of liabilities to pension systems in general; and the FRS, in particular, resulting from benefit changes to system beneficiaries; and as well as an expert in actuarial methods for allocating benefits earned by pension beneficiaries over time.

THE COURT: Have you had experience in all of those fields?

THE WITNESS: Yes, sir.

• • •

[107]

THE COURT: I don't think the man has been held out as a lawyer. It remains with the trier of fact to assess the weight of the evidence, and we are now talking at this point about the admissibility. And so I think—and you are qualified in these fields and testified in this regard?

THE WITNESS: That is correct. I think the point is, to the extent of the law, it says I must use reasonable methods, I need to interpret that in order to perform my function, and I think that's the context of which—.

THE COURT: I think in any of the other disciplines we assume that the people who deal in those other areas have some knowledge of the legal limitations on—on their authority or the outer limits of which they—under which they can give their opinions. So I'm going to let him testify. I think we have clarified your concern, Mr. Melvin.

• • •

BY MR. ANTON:

Q. Mr. Tierney, would you please describe for the Court how the Florida Retirement System provides benefits to the members?

A. Well, it's been pretty well described here before.

• • •

[108]

A. It will only take a few seconds just to review. We've got benefits that are provided by formula, and contributions necessary to fund those benefits must be collected from the participating employers in order to adequately fund the benefits promised by the system.

. . .

[109]

Q. Now, how does the system go about providing or collecting sufficient funds to provide that benefit?

A. Well, generally they charge the participating employers contributions that are derived by our actuarial techniques so that we might make sure that the benefit promised provided by that formula are fully funded.

Q. Now, Mr. Tierney, the Florida Retirement System is a defined benefit plan, correct?

A. That is correct.

Q. Okay. Could you please tell the Court what a defined benefit plan is and how it works?

A. Well, as we can see, the formula here for the Florida Retirement System, it is a defined benefit formula, but more generally defined benefits—this may seem obvious. The defined benefit plan defines the benefit formula and derives the contribution requirement. Okay?

[110]

THE COURT: What is the other kind?

THE WITNESS: The other kind is a defined contribution plan, two general types. The difference, the de-

defined contribution plan, I know this seems obvious, too, defines the contribution formula and derives the benefits. So they both involve benefit accumulation formats and both involve contributions for retirement benefits, but one defines one element and derives the other, the other defines its element and derives the first.

BY MR. ANTON:

Q. Could you describe for the Court how a defined contribution plan works?

A. Just did. The defined contribution plan defines the contributions and derives the benefit thereon.

Let me give you an example. The typical corporate plan is called a profit-sharing plan. Profit-sharing plan is a type of defined contribution plan. If corporate profits are sufficient, say the formula is ten percent of participants' compensation put into the plan, so if they make enough money they can pay ten percent of each participant's compensation into this plan. The ten percent contribution is accumulated in investment earnings, and then at retirement that amount, that accumulated amount is converted within an annuity factor into a lifetime benefit. There are other ways to do it, but that's an example of what can be done, normally what is done

[111]

at retirement to provide monthly benefits.

Q. In a retirement benefit plan, how do you determine what the retirement benefits are going to be?

A. Well, we —.

THE COURT: Is that what you just did here?

THE WITNESS: Yeah. But I think the point is that we don't really know before retirement what they are going to be, so we estimate them through assumptions like the Court has recognized previously.

• • •

Equally, defined contribution plans really don't know what the benefit is going to be at retirement either. We [112]

know the contribution percentage, but we don't know the earnings to which it's going to apply, and we don't know what investment earnings are going to be made on it, but we can estimate that the—we can estimate what the value is and the investment earnings are going to be, and we can estimate that, too.

BY MR. ANTON:

Q. Could you compare and contrast for the Court a defined benefit and defined contribution plan?

A. It—generally the difference, distinction between the two plans occur before retirement and the method by which the formulas are either defined or derived. We have mentioned specifically defined benefit plan, defined benefit and derived contribution, defined contribution plans, to use the opposite, but they still are going toward retirement. There are other things that are very similar between the two plans, how people join up on the plan, their eligibility, the vesting schedule, how they obtain

their rights to those benefits. The choice of that is in the type of plan.

The eligibility for death and disability benefits is also really chosen independent of the type of plan. There is a distinction because of the method by which the benefits are accumulated in terms of investment earnings. In a defined benefit plan, since benefits are defined, the investments are—in effect, the contributions are derived, where as in a

[113]

defined contribution plan, since we define the contributions, then the investment earnings affect the benefits derived. It makes sense, whatever you define, the investment earnings that are available affect whatever is derived.

Okay. So in a defined contribution plan the investment earnings will impact the benefit derivation, but in a defined benefit plan it won't. But that's because the way the plan works.

• • •

A. Now, how the plans are affected, if the plans are increased in benefits before retirement, either you have to change somebody else's benefits in the system, or you have to increase or adjust contribution requirements. Both plans are basically handled the same way. One plan can't handle a benefit increase in general any differently than any other type of plan. If you increase costs, you have to increase the underlying basis by which to collect to pay those costs.

Now, at that time, retirement, that's when the plan becomes identical, once you get to the retirement, even though



[114]

we got through different parts, once you hit retirement and you're looking at what kind of benefits you can provide to participants, that's when the plans become identical.

. . .

[115]

Once we have that starting point, now we want to apply optional forms of benefits. It doesn't matter what type of plan it is. In this example I'm trying to show what a 100 joint and survivor annuity would do.

BY MR. ANTON:

Q. Is that similar to Option III?

A. It is identical to Option III in the Florida Retirement System.

So we take that \$10,000 benefit and multiply times the annuity factor to take into account the joint and survivor benefit, and this is precisely the factors we are talking about

[116]

in this case.

. . .

And, by the way, the standard benefit is a life annuity. And we convert that by use of the same factor to get the same result at a monthly benefit. Okay.

The choice of these factors is depending upon the life expectancy and the investment earnings assumed after retirement. As such, the choice of that, from an actuarial

basis, is independent of the type of plan. It depends on what we think the people's life expectancies are and what investment earnings are to be made by the fund.

THE COURT: Now, you say after retirement?

THE WITNESS: After retirement, yes.

THE COURT: Is it different while they are accumulating it?

THE WITNESS: Could be, yes.

THE COURT: Huh?

THE WITNESS: Yes.

THE COURT: But there is a cleavage or something?

THE WITNESS: Especially in terms of developing the factor. The factor assumes an underlying interest rate as part of the factor, because if you—for example, if you assume a nine percent interest rate, the factor would be different if you assumed seven percent rate in the derivation of that factor. So it is precisely the assumed investment

[117]

return after retirement for purposes of development the factor. Now, it has nothing to do with what the plan does yet, it's just a matter of how we convert the annuity. Okay? It's theoretical investment earnings, really is how it's applied. It's really not into planned funding yet. It's how the factor are actuarially determined.

Okay. The—I think the best way to demonstrate this, as an example, is to point out that the City of Los

Angeles water retirement system has elements of both plans, it's a combination, has both plans in it. They have a defined contribution formula that is based on employee and employer contributions that come up with an account balance at retirement converted into annuity with a minimum benefit of the defined benefit plan calculated, and they get the greater of the two, they get to pick which is greater.

Okay. Once this is chosen, it can be either one or any one participant, they go down the optional annuity factors, and they are exactly the same, no matter what applied, the factors are identical, so it's an excellent demonstration of the fact that the annuity factors are identical, are respective of the plan.

BY MR. ANTON:

Q. That was the system in the Manhart case?

A. Yes, that is the system that was involved in the Manhart case.

[118]

Q. Now, in both plans, defined contribution and defined benefit plans, the risk is on the employer for post-retirement investment earnings?

A. That is correct. After retirement there are no employee contributions or employer contributions collected from the employees or employers based on those retirees, that is correct. The investment risk is on the employer at that point.

Q. Now —

A. By the way, they can lay off that risk on an insurance company by buying an annuity and laying off the risk. But if they assume the risk, that is true, yes, they are, on the investment experiences, the risk is taken by the employer.

Q. You've been the consulting actuary for the Florida Retirement System since 1977?

A. That is correct.

. . .

[128]

Q. Mr. Tierney, what is the amortization rate, or how long can you amortize the actuarial debt under the Florida Retirement System?

A. Well, let's see. I think the—I believe the law—let's see, the allowable period was 40 years, I think—let's see, benefit increase and changes in assumption is 30 years from inception, and as was mentioned previously, due to present changes, the actuarial experience gains or losses or retiree increases are over a 15-year amortization period.

Q. Now, why are you trying to collect the actuarial debt? Is that the money that you expect or anticipate the fund is going to have to pay out in the future?

A. That is correct. The whole purpose of this is to calculate that expected retirement benefit and planned funding for that benefit now so there will be enough funds on hand when that benefit rate becomes due and payable by the system, yes.

. . .

[130]

Q. Now, presently, is it 12.24, the contribution rate?

A. Right.

Q. I believe Mr. McMullian testified that this portion is approximately 5.71?

A. I believe he did, yes.

Q. So that's the part of the debt or the contribution that is just being used to amortize the debt?

A. Right. Yes.

Q. To review, now, that's the process at which we go through?

[131]

A. That's the process we go through to determine the contribution requirement. And what I would like to do is to just make sure we remember the general philosophy behind those more specific calculations. First there is a precise mathematical relationship between that benefit promised and the contributions derived as I have demonstrated.

\* \* \*

[134]

Q. Mr. Tierney, go back to the top up. Why can't you just change some of your assumptions to cover that increase?

A. You mean by—you mean by changing the mathematical factors used to determine that?

Q. Yeah. Assuming the Court here was to order the Defendants to top up to whatever level, can you just

simply change some of your assumptions to make up for that additional cost?

A. Well, generally that would not be viewed as appropriate. To just give you an example, if we assume nine percent to determine this benefit funding mechanism, to me it would be clearly inappropriate to use nine-and-a-half percent to value this new benefit. Now, it would be all right to change and say, well, we think nine-and-a-half percent is better than nine percent and to use the whole thing, that way that would be consistent, if you thought nine-and-a-half percent was okay, that would be reasonable. But then once you do nine-and-a-half, you are measuring this increase on that basis, and you still have the similar-type impact. Okay? So we would not change the interest assumption used for part of the liability to provide for the increase. Whatever we chose as an assumption would apply to the whole plan, and we would not

[135]

change that assumption just for that one part.

Okay. To review. The FRS is a long-term payment plan. The actuarial funding method is a long-term payment plan. This was started for some members many years ago in the past based on the benefits that were promised them and including sex distinct option tables. So part of what we have done in the past when we provided these cost projections is those factors that we plugged in there when we looked at those charts and saw the annuity factors, those were on a sex distinct basis. Okay? So as we have done these studies through the years, whenever we have studied this, every time we have



studied it before 1983 we always used sex distinct factors. Okay? And that's because it was thought to be that those factors were all right.

THE COURT: Actuarially sound?

THE WITNESS: Well, they were.

THE COURT: Based upon mortality?

THE WITNESS: Certainly they were actuarially sound, but we also thought they were legal, so that's why we used them.

THE COURT: I understand. But you feel they were at least actuarially sound?

THE WITNESS: That is correct. And they still are.

THE COURT: Based upon the current mortality?

THE WITNESS: And they still are actuarially sound,

• • •

[136]

This long-term plan results in our expected future benefit payments covered by expected future assets. Okay? That's the plan. The contribution requirement we have in our report is that requirement that we feel will make sure that assets cover that. Not—not cover it and then have a little extra. The expectation is that they will be equally matched. Okay? So the point is that the funding calculations are based on that expectation that there are no excess assets, that the future benefit promises have all the expected future assets taken up. There are no excess assets as part of this funding.

Q. You don't build a cushion into it?

A. That is correct.

• • •

[139]

Q. So the Florida Retirement System is not a pay-as-you-go plan?

A. I think I—I hope I have amply demonstrated that so far, yes. Unlike Social Security, this is an advanced funding plan to make sure we have our future benefit promises covered.

Okay. The third element is that FRS is required by the State Constitution to make projections—this is Article 10, Section 14, to make projections for increases of benefits on a sound actuarial basis, that is increased contributions to pay for increased benefits.

Okay. If we

• • •

disturb that relationship, if we increase the benefits, we have to increase the contribution requirement to maintain that balance.

THE COURT: That's not the direct mathematical relationship, is it?

[140]

THE WITNESS: Yes, it is.

THE COURT: Okay.

THE WITNESS: Yes, it is. That's precisely what it is. Okay.

• • •

[149]

Q. Mr. Tierney, in your opinion, as the actuary with responsibility, for example, for the financial condition of the Florida Retirement System, with respect to it meeting its obligations, its expected obligations, in your opinion, does the FRS have funds in excess of its obligations with which to pay increased benefits to the class?

A. No. The expected future assets are fully allocated to provide future benefits to participants.

Q. In your opinion, Mr. Tierney, is the Florida Retirement System expected to have such excess funds in the future without an increase in the contributions required to fund the plan?

A. No. Same as before. We have allocated all the assets to provide for promised benefits.

Q. To the point of redundancy, Mr. Tierney, what is the

[150]

purpose of the contributions currently being collected for FRS?

A. To pay for the promised benefits of the members in the system.

Q. Those contributions do not contemplate an increase in benefits in the plan's current—as the plan's currently devised?

A. No.

Q. Now, Mr. Tierney, this 24 or 25 basis points that the Legislature added—. Why don't we clear this up.

There were 25 basis points they added in excess of what you recommended?

A. Yes.

Q. And one of those basis points went to fund a cost-of-living increase?

A. Right. We recommended that one basis point be assigned to retiree increases.

Q. Okay. Now, these 24 or 25 basis points that were added to the contribution rate by the Legislature in 1984, that money that's been generated from that increased rate, that is being set aside as a slush fund or a contingency fund?

A. No. It's the normal valuation process, and contribution requirements were determined with no such excess in mind.

Q. Mr. Tierney, are you familiar with the various ranges of relief sought in this case?

[151]

A. Yes, I am.

Q. In your opinion, what would be the result of an award of the relief sought by the Plaintiffs in this case?

A. An increase in contribution requirements to the system.

Q. Would that be an across-the-board increase to all plan employers?

A. It would be applied to the members currently participating in the system, yes.

Q. And, again, why can't you just change some of your assumptions to pay for any awards that the Court might grant?

A. Well, as before, we consider it inappropriate to change an assumption just for a particular benefit increase. If an assumption change is warranted, we should do that for the whole system, not just for precisely this purpose.

. . .

Q. Mr. Tierney, are you familiar with the issue of proration as it has become to be known in this case?

A. Yes.

Q. Could you define it for the Court?

A. Well, proration to me means the allocation of benefits to periods before and after a date certain.

. . .

[152]

Q. Does there exist more than one method of proration?

A. Yes. The two types that I have categorized generally are contribution proration, which could either be theoretical or actual contributions, and benefit proration, which either could be actual accrued benefits or estimated accrued benefits.

Q. In your opinion, are these methods of proration generally accepted as feasible actuarial techniques?

A. Yes.

Q. Is there any one proration method which would be more appropriate than another?

A. Well, usually the method chosen depends upon the objectives

[153]

of the person that's prorating. Normally we want to find out the given intent before we choose the most appropriate method. For example, if one wanted to relate to contributions made by a system, it would normally be considered more appropriate to use contribution proration rather than benefit proration. On the other hand, if one wanted to relate to benefits accrued under the system, then we would choose a benefit proration method.

. . .

[159]

Q. Mr. Tierney, have you prepared proration calculations using the various methodologies that we have discussed?

A. Yes.

. . .

[160]

Q. Now, in your opinion, which of these proration methods is better suited, practically speaking, to the Florida Retirement System?

A. Well, taking everything into consideration, and in the

[161]

absence of any guidance by having someone tell me which they prefer to emphasize, like I mentioned before, I think



the accrued benefit proration method, since it's more directly applicable and does not require approximation, is probably the method I would use if I were asked.

THE COURT: What is that, sir?

THE WITNESS: The accrued benefit proration method.

. . .

Q. Now, Mr. Tierney, are you aware of any defined pension plans that have actually used these proration methods?

A. Yes, I am.

Q. Which systems? Would you identify them for the Court?

A. Yes. There is two that I know of. The Pennsylvania

[162]

General Employee System and the Pennsylvania Teachers System both used a benefit proration method in going to unisex option factors;

. . .

[167]

Q. You were consulting actuary at the time of the Manhart decision?

A. Yes.

. . .

[171]

Q. Mr. Tierney, what was the advice that you—or did you perceive Manhart to require the Florida Retirement System to change to unisex?

. . .

[172]

A. We advised our clients that in our opinion the Manhart decision did not address optional factors.

BY MR. ANTON:

Q. In a defined benefit plan?

A. In any plan.

. . .

[180]

# CROSS-EXAMINATION

BY MR. MELVIN:

Q. Mr. Tierney, what's the value of the one base point? Apparently you were using such a value when you interpreted damage totals back into base points a few moments ago. For that purpose, what value were you assigning to a base point?

. . .

[182]

A. Around \$9 million, give or take a million. I'm solving backwards. So I don't have the precise calculation. Say nine million, give or take, per base point.

BY MR. MELVIN: .

Q. One base point equals approximately nine million?

A. Right. I can calculate it a little better than that if you want by dividing directly, if you want me to do that. Is that close enough for your purposes?

. . .

[185]

Q. Correct. Thank you.

Now, as between these two choices that you think constitute alternatives, which one of them did the State of Florida use when it converted Class B to the unisex table on August 1, 1983?

A. Class B being?

Q. The vested but not terminated, not yet retired employees.

A. The post-'83 retirees?

Q. Yes. Which proration method did you use, benefit or contribution?

A. Well, the proration itself is a division of benefits. What they did was after they divided the benefits theory, the pre-'83 portion, instead of being sex distinct, they used unisex factors, too. So even though the proration occurred to separate pre and post-'83 benefits, they did not apply sex distinct factors for the pre-'83 benefits, they used unisex factors for both pre and post-'83 benefits.

Q. I'm not sure I understand.

A. A proration.

Q. Let me rephrase my question. It's probably in the

[186]

question, not in your answer.

Please tell us, just in language that's consistent with the explanation of proration you have taken us through today, trying to keep the same kind of words and concepts,

which of those proration methods the State used when it adopted this unisex table August 1, 1983 and made it applicable to the persons retiring on or after that date.

A. Well, what I'm trying to do is make a distinction between the proration technique which is merely—

Q. Uh-huh. Okay.

A. —allocating benefits before and after a date certain with application of factors to those benefits. My point is—

Q. Mr. Tierney, the point is, they didn't do either one, did they, sir?

A. The point is, the factors were unisex for both pre and post-'83. There was no division of the benefits for purposes of applying different sets of factors. The same unisex factors were applied to both pre-'83 and post-'83 benefits.

Q. Is it true that they did not prorate either on what you have explained to be a benefit theory or upon what you have explained to be a contribution theory; is that correct?

A. Again, the proration itself is not germane to what—the factors that were applied. What is germane, there were unisex factors applied. There was no two sets of factors applied, one set of factors was applied.

[187]

Q. You did that in your example here?

A. That is correct.

Q. All right, sir. Now, please, at the risk of trying to—

A. Well, that's it.

Q. —become more clear, the State of Florida, your explaining, did not utilize these theories in their accrued benefit or the one you call accrued proration two years ago or so when it shifted all of the other persons onto a unisex table, did it?

A. Proration is not a theory. Proration is apportionment, a calculation.

Q. I'm sorry?

A. Let's assume these pre-5-78's were pre-'83 and post-'83, okay, just to change the example.

Q. Uh-huh.

A. Okay. All I'm saying is the benefit divided up no problem. Down here this was not done. In other words, the application of the options were not made for different parts of the benefit. So the proration itself is merely the division of the benefits before and after a period certain. Once you prorate the benefits, then what you apply to it I think is what you're talking about.

Q. Are you saying—no, wait a minute.

A. Instead of —.

THE COURT: Wait. One at a time, gentlemen.  
One at  
[188]  
a time.

Let me ask a question. There was no proration done because in your judgment this is really not germane to this?

THE WITNESS: Right, the proration itself.

THE COURT: So the answer, there was no proration done, right?

THE WITNESS: The proration itself was not germane because it was not used to develop—to apply to two different sets of factors, unisex or sex distinct.

THE COURT: I think what Mr. Melvin was asking, was proration done on either the benefit or the contribution?

MR. MELVIN: And the answer was no.

THE COURT: And the answer is no. And the reason it wasn't done is because from an actuarial standpoint it's really not pertinent, right?

THE WITNESS: Okay. So long as I am defining proration as a technique of calculation.

THE COURT: Okay. Next question.

MR. MELVIN: Thank you.

. . .

[195]

Q. All right. Now, would you please—please tell the Court what equitable consideration, factual matter you pointed to that justifies converting the figure of this dimension which is simply derived in the way I explained into something that amounts to mere fractions of that amount?

A. Let's—I think maybe I can help a little here. I think what I am saying is that if you wish to attribute



benefits before and after a date certain, I can assign values to what it would cost to unisex the portion of the benefit after that date certain.

Q. You said —.

A. And I think I am saying I believe it is a legal question, not an actuarial one, about whether or not this particular method or any method is applicable, okay. What I am saying is if you think—if you think allocation of benefits before and after a date certain is called for, this is an appropriate technique and these results are consistent with that technique and they are actuarially correct.

Q. The situation is, Mr. Tierney —.

A. Does that help?

Q. Yes, I think so. You are not proposing it, but you are explaining how to do it if someone else concludes it's desirable, correct?

A. Right. I do not believe it is an actuarial responsibility to decide whether it's applicable in this case.

• • •

[208]

Q. With respect to Mr. Anton's questions of you about the Auditor General's report, the differences that you men had among yourselves as professionals about what might be the best basis point increase to propose to the Legislature in 1984, directing your attention to that matter. Is it correct that you responded in writing to Secretary Smith with respect to all of the criticisms that were in the Auditor General's report by a letter dated

May 3, 1984? And that's what I'm handing you as Exhibit 18 for identification.

A. Yes; that is correct.

Q. All right, sir. Now —.

(Pause)

Let's focus on the part of your response that deals with the amortization policy.

A. Do you have a reference to a paragraph number?

Q. Yes, sir. I believe you will find that beginning on the tenth page you're referencing the 81st through the 90th paragraph on the Auditor General's report on your Page 10. You give it a topical heading, "The current amortization policy is overly optimistic and may result in unacceptable liability increase, annual payroll contribution rates should be increased by one percent." Now, that's quoting the Auditor General's criticism, correct?

[209]

A. Our response was addressing that criticism; that is correct.

Q. What I read so far is his criticism, not your answer.

A. That's correct.

Q. And the one percent, that translates into a hundred base points, right?

A. Correct.

Q. Okay. And you said:

"It is very important to view the UAAL not merely as an absolute dollar amount but primarily as a quantity,

the magnitude of which can best be expressed in relations to other obligations of the State.

"According to one school of thought, pensions are a form of deferred compensation and hence should be considered as a payroll-related obligation. If one accepts this point of view and also realizes that pension obligations are funded as a direct percentage of payroll, it then becomes meaningful to study the current and projected magnitude of the UAAL as it relates to current and projected annual payroll under the FRS."

And then you said:

"The projections included in the Tillinghast report indicate that despite the increasing dollar magnitude of the UAAL, the ratio of the UAAL to the FRS annual payroll is expected to decline from 108 percent in 1983 to 64 percent

[210]

in 1995 (the year in which the projected UAAL is expected to reach its maximum)."

Then you said:

"This ratio of UAAL to annual payroll then rapidly decreases to zero."

A. That's because it becomes fully amortized.

Q. Just a little more to read.

"The funding policy for the eventual amortization of the UAAL was carefully conceived prior to the 1977 actuarial review. It was then codified in Florida law and has been strictly adhered to since that time. The policy

was designed with the financial condition of the FRS as the primary consideration; however, a critical secondary consideration was the equitable apportionment of pension costs over current and future generations of taxpayers. The alternative UAAL funding proposals illustrated in Tables IV-4 and 5 of the PAR would undoubtedly enhance the financial condition of FRS but would do so by means of a pronounced increase in the funding burden placed upon current taxpayers with a corresponding decrease in the" future "responsibilities to be borne by future taxpayers. A deliberate reallocation of financial responsibilities favoring future taxpayers at the expense of current taxpayers is a matter of State policy and is beyond the purview of Tillinghast's assignment."

Do you still agree with the remarks that you made  
[211]  
then?

A. Yeah.

MR. ANTON: Your Honor, for the record, I believe Mr. Melvin may have misstated a word. I think it's "decrease in funding responsibility," not future responsibilities.

MR. MELVIN: I'm sorry. Did I?  
Yes. Yes.

. . .

[213]

Q. Yes. Now, would you look at the second page, please?

(Pause)

I believe you state there that you are going to respond to another criticism of the Auditor General, and it was:

[214]

"The current actuarial valuation reported that the Florida Retirement System's unfunded accrued liability—."

A. That's the actuarial debt. I'm just trying to relate to our current—sorry to interrupt.

Q. Thank you. But quoting the Auditor General, this was his criticism:

"The current actuarial valuation reported that the Florida Retirement System's unfunded accrued liability, the value of earned pension benefits not covered by plan assets increased from \$4.3 billion in 1980 to approximately \$6.4 billion in 1983."

And your response was as follows:

"This is a very unfortunate statement for two reasons. First, it sets a very negative tone for the remainder of the PAR and suggests to the cursory reader that the FRS is in serious financial difficulty. Second, the statement is absolutely false."

And you underlined "absolutely" and "false," correct?

A. Yes.

Q. And after two dashes you add:

"And is a prime example of invalid conclusions reached through mistaken interpretation of actuarial information."

Do you stand by that statement today, sir?

[215]

A. Yes, sir.

Q. And then you further said:

"In point of fact, members' earned pension benefits are well funded. Specifically, members' vested accrued benefits are more than 100 percent funded by current plan assets. The 6.4 billion of unfunded accrued liability has literally nothing to do with the current funded status of accrued benefits."

Do you stand by that statement?

A. Right. The funding requirements are different than the current funded status, as we demonstrated.

• • •

---



[3-0]

[Caption Omitted In Printing]

VOLUME III  
TRANSCRIPT OF THIRD DAY OF  
IMPACT HEARING  
[February 5, 1986]

. . .

[3-1]

THE COURT: Good morning.

. . .

I—I guess you want the actuary back on the stand; is that right?

MR. MELVIN: Mr. Tierney, please; yes.

. . .

CROSS-EXAMINATION

BY MR. MELVIN:

. . .

[3-4]

Q. You may, if you need to, but let me pursue the question in this way: is there, among members of your profession, a recognized range that would apply to that assumption, meaning that acknowledged, reasonable professionals in your area differ somewhat as to the best projected rate of return to use in such a situation, and is there a range, in your experience, that you find people recommending?

A. Well, just as there are different interest rates used by different actuaries with different opinions, there is also different ranges of reasonableness.

Q. Okay, sir. Thank you.

In your own opinion, although you recommend a rate of nine, what is the range of reasonableness around that figure, in your judgment?

(Pause)

A. Oh, I would say between eight and ten.

Q. What is the—?

A. It depends on the purpose of the valuation and specific investment and strategies. It depends on all sorts of things. Other things being equal, to try to answer the question generally, I would say between eight and ten.

Q. Okay. That's the range within which professional people could legitimately debate the matter and no one hitting too far

[3-5]

off the mark?

A. I think eight and nine percent is a range of reasonableness. That isn't to say other people wouldn't have different opinions or different plans.

Q. Correct.

A. For example, there is interest rates outside that range used for other plans.

. . .

[3-7]

Q. Calling your attention to the signature page, Mr. Tierney, I notice you are not the only person who signed this it was also signed by Mr. F. Bard Brutzman. Would you tell the Court who Mr. Brutzman is?

A. He's a consulting actuary with Tillinghast.

Q. Is he one of your colleagues, qualified person who you respect and have regard for professionally?

A. Yes.

Q. You have made some references in the course of your testimony to actuarial balance, I think you called it. I would like to put before you Plaintiffs' Exhibit 19 which appears to be a letter written by Mr. Brutzman on January 8, 1983, to Mr. A. J. McMullian, copies of which went to Mr. Gibney, Mr. Ferguson and apparently also to you, Mr. Tierney, and it has some attachments thereto. Are you familiar with that letter?

A. Yes.

[3-8]

(Pause)

Q. I would like to direct your attention to the second and third sentences that appear in the second paragraph of that letter wherein Mr. Brutzman makes this statement:

"I must admit, however, that I was a little amused by the Wyatt usage —."

Excuse me. Is the Wyatt Company recognized as actuaries, something like Tillinghast, Nelson and Warren? Is that a fair description of their business?

A. I think so.

Q. All right.

"I must admit, however, that I was a little bit amused by the Wyatt usage twice of the term 'actuarially sound'. That term, as you know, is without definition and therefore very convenient for many purposes, sort of like 'good' or 'bad'."

Do you agree with his comment about the use of that type of language?

A. I think the point is that the term "actuarially sound" and of itself does not precisely define a specific method or procedure, and so you have to go further than that in order to be able to know what that means.

Q. You do agree with your colleague, Mr. Brutzman? don't you?

A. There is no specific definition, but it does have a — ? The meaning is general.

[3-9]

Q. You do agree with your colleague, Mr. Brutzman?

A. Not precisely, but generally, yes.

• • •

Q. When you—I believe you testified yesterday that you gave the State of Florida an opinion as to whether the Manhart case stated a rule of law applicable to options, to actuarial equivalency, correct?

A. Uh-huh.

Q. And you stated that you told the State you felt it did not?

A. It did not address it, yes.

Q. Did not address that?

A. Uh-huh.

Q. In giving that opinion, were you giving a legal opinion or an actuarial one, sir?

A. My opinion was based upon what the judge said in the proceedings.

Q. Yes, sir. As you perceive —.

A. May I tell you what the judge said in the proceedings?

Q. No. Let me just continue with my questions, if you don't mind.

As you perceive what you were doing at the time, do you think you were expressing a legal opinion or an actuarial opinion, sir?

A. I think I was opining based on what the judge precisely

[3-10]

said and not interpreting anything the court may have ruled.

Q. Do you not believe that you were interpreting the court?

A. No, I believe I was quoting what the judge said.

Q. I see.

A. See, the judge said this: Question. Go ahead, tell me what you want to tell me, so go ahead. Answer. In the proceedings, transcript of proceedings dated October 1974—.

Q. What do you have before you, Mr. Tierney? Is this from the Manhart opinion before the Supreme Court of the United States?

A. Uh-huh.

Q. This is captioned in the United States District Court, Central District of California, before the Honorable Harry Pregerson, I believe the name is. You are going to read from that? Go ahead.

A. This is the attorney, Mrs. Flier. Mrs. Flier says:

"In addition to which they haven't bothered asking or discussing how the court at this particular time is going to handle the option situation. In the affidavit which we submitted from Harry Church, it was pointed out that the department has four options planned which are voluntary and sponsored by the employee."

I think that is supposed to be "employer".

What I mean by that is, the department has an obligation to the employee, and upon retirement the obligation is measured in

[3-11]

x-dollars, let's say a hundred thousand dollars. Now, the employee says, okay, fine. I don't want to take a standard pension, I want some variation. So the employer says, fine, you can have a variation, but now since we are going to have to cover two people for the hundred, you are going to have to have some type of discount. So the employee says, fine.

"Well, now, your woman has less of a discount, obviously, than your man at this time, because it is pre-supposed that when she dies, if she has a spouse living at that time, he will certainly not live as long as the female would live, the female spouse of a male employee.

"Now, how is the court going to handle that, or is expected to handle that at this time?

"THE COURT: I am not in the insurance business. I leave that for others."



Q. And on that basis you came to the conclusion that the opinion by the Supreme Court was not a precedent that had any bearing upon the matter of options or actuarial equivalent transactions into options, that was your conclusion?

A. My conclusion was that the court did not address it.

. . .

[3-23]

Q. Okay. Thank you, sir.

Do you have an opinion as to how much the FRS can afford to pay to these people if you assume that they are owed \$200 million in present money value? Do you have an opinion as to how much the fund can afford to pay without suffering disruption in its ability to pay benefits to its pensioners, say, during the next 15 years? Will it be an effect in the next 15 years upon the ability of the fund to pay its debts?

A. The ability of the fund to pay its debts?

Q. Uh-huh.

A. Debts as we define it? Yes, there will be a disruption.

[3-24]

Q. When will the disruption first appear?

A. Immediately.

Q. And how will it show itself?

A. Through an increase in liabilities of \$200 million that we haven't planned for.

Q. And does that mean that somebody is not going to get paid immediately?

A. No, that's different.

Q. All right. Say, with my question, then, for somebody who isn't first going to get paid, can you envision that happening for 15 years?

A. Envisioning that they would not get paid?

Q. Yeah. Yes, sir.

A. No, I don't think so.

THE COURT: Sir?

BY MR. MELVIN:

Q. You can't envision it in 20 years, can you?

THE COURT: Is your answer no, Mr. Tierney?

THE WITNESS: The answer is I think everybody would be paid in the next 15 years.

THE COURT: Everybody in the retirement system?

THE WITNESS: Keep in mind we're not in actuarial balance, we haven't planned for this liability.

THE COURT: I understand that. Nobody is going to retire, you know, from the Water Management District at Belle

[3-25]

Glade, to the Commander in Chief of the National Guard is going to lose a penny in retirement in the next 15 years; is that right?

THE WITNESS: That, I believe, is correct.

THE COURT: All right.

BY MR. MELVIN:

Q. How about 20 years?

A. Well, rather than to continue with this, what I would like to do is make a statement.

Q. I prefer you answer my question, if you don't mind, because that's the process we follow here. What do you think about 20 years?

A. Haven't thought about it.

Q. Well, if I gave you a moment to think about it, would you be able to give me an answer, or should I skip it?

A. I think, first of all, in order to understand that question, understand the answer to the question, you have to know that we did not make those projections.

Q. I understand.

A. The reason why we didn't make those projections is if the system had a cash flow problem, that is this long-term plan affected by what you happen to have today in terms of what you have to do, and once you can answer that question, yes, you're okay today, you don't have to do anything special in your funding mechanism to adjust for it. And once that—that you

[3-26]

know that you're all right immediately, therefore, you can go with your long-term plan, then you don't go—and how much you pay 20 years from now is not germane to the plan. Okay? But let me help you. Let me try to—from the actuarial viewpoint. The purpose of the contribution

requirements are to plan to pay for the benefits. Okay? And in my opinion, if the system will plan for this increase at \$200 million by increasing the contribution requirements, they will be able to manage that.

Q. And—

A. They will not have a cash flow problem because they will have planned for this payment and it will not be a problem.

Q. And they are going to be actuarially sound also?

A. That's correct.

Q. Whatever that means, right?

A. Right.

Q. And if you don't do it your way, people are still going to get their pension checks for at least 15 years, maybe longer, but you are not sure you will still be actuarially sound?

A. I know I won't be actuarially sound immediately, that's clear. Also it's against the law. It's unclear whether the system will have to be stopped again. Again, that's a legal matter, not an actuarial matter.

My point is that the contribution requirements are increased to recognize this liability that the system does not have a problem, it does not run out of money along the way, it

[3-27]

will always have enough money, you know, in accordance with our expectation to pay the promised benefits.

• • •

[3-28]

Q. Therefore, what you can tell us about impact basically is that there will be one, and that in the concept of things being somehow always in balance, when you put an impact on something balanced, it becomes a little bit imbalanced, and beyond that you really can't describe that impact for us, can you?

A. Oh, certainly. There is immediate impact, present value of which you, in your example, is \$200 million.

Q. Okay.

A. And if we do not take that into account, we are irresponsible actuarially.

Q. But as to how that's going to impact the function of the fund and its ability to honor its obligations to its pensioners over the next several decades, you simply can't tell us, can you?

A. As long as the Defendants are provided for actuarially, whatever you said is fine with me.

• • •

[3-34]

Q. You testified yesterday about the Manhart plan and made some factual statements. I need to know if this is information that Mr. Tierney possesses personally or if it's something you are assuming for the purpose of your opinion. You—you explained how that plan functioned. Where did you get your information about the functioning of the plan? Is this from the reading of the cases or something?

A. Well, I went to Los Angeles and I talked to the attorney that was responsible for the plan, and he described

the plan to me, and I got a copy of the plan document and read the plan document, and I talked to the administrator of the plan and asked him questions with regard to the plan document. So I had a pretty good understanding of how the plan worked.

Q. And then you repeated that for us yesterday.

A. Right.

• • •

[3-41]

### REDIRECT EXAMINATION

BY MR. ANTON:

Q. Mr. Tierney, yesterday questioning from Mr. Melvin you indicated that the value of one basis point was approximately \$9 million?

A. Yes, that's true.

[3-42]

Q. Is that a present value over a period of time, one basis point?

A. That's the single sum present value. The amortization of that nine million is seven or \$800,000 a year.

Q. Assuming the Legislature tomorrow enacted a one basis point increase in the contribution rate and then exactly a year later withdrew that one basis point increase, how much money would that have brought into the Florida Retirement System?

A. Just the one year's amortization of seven to \$800,000.

• • •



[3-44]

Q. Mr. Melvin also asked you about what would happen if \$200 million were taken out of the funds, would the people over the next 15 years still be able to collect their benefits. I believe you answered they should be able to.

[3-45]

A. (Nodded affirmatively)

Q. What would happen if the contribution rates were not increased to match that \$200 million loss?

A. The system would be not in actuarial balance, and we would—our opinion would be that it is not properly funded.

. . .

[3-47]

THE COURT: Mr. Tierney, you have been the contract consultant, I guess, to the in-house actuary for the Florida Retirement System since 1977, right?

THE WITNESS: Right. Our contract is really with the Department of Administration.

THE COURT: All right. When did this system begin, the Florida Retirement System?

THE WITNESS: I think it started in the 1930s with the old teacher system, but I think other people are better at the history background than I.

[3-48]

THE COURT: All right. Okay. I just thought in review—at any point was there contributions from the State workers themselves in this?

THE WITNESS: Yes. All workers—or most all workers contributed up to 1974. In fact, all the retirees that were retired up through 1983 I believe had employee contributions as part of the benefit promise.

THE COURT: All right. So the—and when did it become all State money, as it were?

THE WITNESS: 1975, I believe.

. . .

THE COURT: Oh, I see. Is there in this money that is now being paid to retirees anything representing employee contributions, as it were?

THE WITNESS: Yes.

THE COURT: But since, what, '75 it's been fully paid by the governmental entity?

THE WITNESS: Right. Current retirees have a [3-49]

portion of their benefits that had been paid for by the State and a portion of the benefits that have been paid for by themselves.

. . .

---

[3-50]

JAMES McCLAVE

was called as a witness for the Defendants,

• • •

## DIRECT EXAMINATION

BY MR. COLLETTE:

Q. Dr. McClave, what is your present employment?

A. I'm a—currently an associate professor of Business and Economic Statistics at the University of Florida, and I'm also president of the statistical consulting firm by the name of

[3-51]

Info Tech in Gainesville.

• • •

[3-54]

MR. COLLETTE: Your Honor, I would submit Dr. McClave as an expert in statistics and econometrics, with an emphasis among other areas, governmental growth, taxes, population and economic forecasting.

[3-55]

MR. MELVIN: Within the confines of the summary of his testimony that I have read, I have no objection to his proposed expertise in those areas.

THE COURT: Let's proceed, then.

• • •

BY MR. COLLETTE:

Q. Dr. McClave, would you explain the assignment that was given to you in this area?

A. I was asked to assess the impact of several proposed damage awards from this case on the contributors to FRS, namely the local governments, school districts, the State itself. That's what I took as my assignment.

• • •

[3-74]

Q. Out of that—those 15 counties, did you happen to look at the most impacted?

[3-75]

A. Yes. Again, I want to emphasize that I didn't just look at these in the year 2000. We looked at them every year again, the year 1985 and 2000. So there you see the five most impacted counties. It shows most clearly that Lafayette leads the pack there. But the others, most of them are—the top five are well in excess of ten mills or would be given current trends by 1990, and, of course, they are all in excess by the year 2000, as well.

Q. What's the implication of it, Dr. McClave?

A. Well, again, I think the implication is fairly clear, that there are a significant number, 15 or so counties, that even given conservative growth in their expenditure rates, are going to have to deal with revenue shortages or either going to have to make them up in other places, passed upon to get the debt service millage up or in fact cut expenditures, beginning to cut services to their respective counties.

Q. Let me give you an assumption in this regard. The assumption is that the constitutional prohibition against the ten mill higher rate will not be repealed, and the second assumption is that local taxpayers will not put additional millage for bond service. Given those assumptions, what is your opinion of what will occur?

A. My opinion is that they are going to have to cut services, they are going to have to cut expenditures, which means cutting some services out.

. . .

[3-90]

Q. Dr. McClave, are you saying,—based on the data in your projections, am I to understand you to be saying that there are a number of local governments, county governments and school boards in serious trouble?

THE COURT: You mean tax-wise?

MR. COLLETTE: Tax-wise.

BY MR. COLLETTE:

Q. Has something got to give?

A. Yes, from the point of view of tax pressure, there are

[3-91]

some—and I'm not sure I can do this, but if you just look at the total picture, school boards, plus taxes per household, plus local, out of the 67 counties, 47 of them end up having—with conservative growth assumptions in their expenditures, having this upward pressure to one degree or another on their millage rates. In other words, all of these end up bumping into millage rate problems or

bumping—going up over that bench mark cap of \$8,500, \$10,333 and 14,000 that I established before. So well over half the counties are facing serious tax problems, from my projections.

Q. Let's assume that they can't—they can't get additional revenue and can't go over the ten mills. What's your opinion as to what must occur?

A. Again, once you start restricting the revenue, then the other choice is to reduce expenditures. So my answer would be that a significant number of these, including the state itself, are going to have to reduce expenditures if they are not going to increase taxes.

. . .

[3-93]

Q. What is the import of this, then?

A. I'm sorry?

Q. What is the import?

A. The import, again, I think, is to show that there are a significant number of counties, when you look at the per household, no matter what their property values are, who are either going to have to contend with the idea of cutting services, or you are going to have to convince the taxpayers to increase at a reasonable kind of rate.

. . .

[3-96]

Q. Now, Dr. McClave, you stated that one of your sources and one of the things you were looking at was the damage calculations and the contribution requirements.



Do you have an opinion or conclusion with respect to that, within the context of this case?

A. Well, whatever the damage award it adds or is projected to add something to this, this current contribution rate,

[3-97]

which is 12.24 percent. And depending on how much is added, of course, there is a proportional impact. I think the important thing from the economic point of view is that whatever the—whatever the award, if it's an increase in contribution rate, it's countered to what many of the counties that we've talked about today have to do;

• • •

Q. Would you explain?

A. Well, the explanation is relatively simple. Using conservative assumptions, we have got over half the counties that are going to be bumping up against constitutional limits on their tax rates. The choices that they have, other than amending the Constitution, is to cut expenditures. If they cut expenditures, they can do it by not giving salary increases and/or cutting positions out.

• • •

[3-100]

Q. Dr. McClave, I was asking you about the impact, you were talking about sort of like trying to fit a piece of a slice of a pie where there isn't room.

A. Well, the impact itself, when you look at it on a per capita or per-almost-anything basis, if you—you know,

in one sense you say \$75 million reduction due to Gramm-Rudman, that's only \$15 per household, maybe it doesn't sound bad. Then when you think, there are five million households out there, it's a lot of dollars. You've got the same kind of impact with the increase in contribution rate. As far as how that affects the counties' total pie, the total revenue and expenditure picture, it's a little slice. But the fact of the matter is the whole budget is made up of lots of little slices. What I'm saying is for a significant number of counties, they have got to reduce that pie by taking out slices, and anything we do, whatever it may be, to add or force those slices in there, is going to have an impact, a more severe impact on some of these counties that we've talked about today.

Q. Let me ask you a final question. Isn't there some level of damage award in this case that in your opinion will not cause an impact?

A. Well, again, I'm not going to give you an actuarial answer to that because I'm not an actuary. Again, what I think

[3-101]

what I'm saying is this: that any increase in dollar value to these budgets that are—in my opinion, have got to go in the other direction is counter to what they've got to do, and so it's going to add, you know, more pressure. I'm not going to say it's the straw that broke the camel's back. I'm not going to say it's anything like that. The point is, it's another slice of pie that's got to be put into the budgetary picture when in fact I see more than half the counties having pulled slices out.

• • •

[3-122]

E. J. YELTON

was called as a witness for the Plaintiffs,

• • •

## DIRECT EXAMINATION

BY MR. MELVIN:

• • •

Q. Tell the Court, please, what your position is.

A. Executive Director of the staff of the State Board of Administration.

Q. Tell the Court what that job involves, please.

A. There are three basic duties assigned to the State Board of Administration. One is to invest the balances in the Florida Retirement System Trust Fund that have been transferred

[3-123]

to us from the Division of Retirement. Two is to invest the balances in the local government surplus fund.

• • •

The first is to invest the balances in the Florida Retirement System Trust Fund that have been transferred to us from the Division of Retirement.

• • •

Second, to invest the balances in the local government surplus funds trust fund which are monies sent in to us from local governments for investment. And third is to provide debt service on most state bond issues.

Q. Okay. Is it fair to say that it is your Department under your supervision that is responsible for the investments of the fund that are received by or for the Florida Retirement System?

A. As a practical matter, that's correct.

• • •

[3-125]

Q. Let me show you Exhibit 12. Can you identify it for the Judge and tell him what information it reflects?

A. Yes, sir. This is what I would call a staff working paper, not an accounting product from my accounting staff. It's prepared by our economists who shortly after month end estimates from more than one source the market value of all of our assets. And this is the working document that we made our January asset allocation decision based upon.

Q. January '86?

A. January 1986; that's correct.

Q. Okay, sir. Please tell the Court what the amount of fund assets were as of 12-31-85.

A. Based upon this working paper, slightly over \$10 billion, \$10 billion, thirty-two million.

Q. Thank you, sir. Are you able to tell us also, Dr. Yelton, what the corresponding figure of how much an increase that represents in assets over the comparable period last year?

THE COURT: Are you talking about the end of January, '85?

MR. MELVIN: Versus '84. I—I mean—yes. Yes.

A. Not at this time. I did not bring that information with me.

BY MR. MELVIN:

[3-126]

Q. Can you approximate it for us?

(Pause)

A. I am quite reluctant to do that because —.

THE COURT: Okay. Don't do it, then.

A. Because there was a significant run-up of the market. You can get that specific information in here on fairly short notice.

THE COURT: Well, I think everybody knows the market's gone up in the last year. Was it less than—than 10.32 billion last year?

THE WITNESS: Significantly so, yes, sir.

• • •

[3-127]

Q. With reference to Page 35 of the 1984 Annual Report of the Florida Retirement System, there is a statement that we have referred to earlier that says:

"The FRS is currently in a stage described as youthful or immature; that is, its net cash flow is positive and large. Contributions plus current investment income far exceed current years' payments to retirees and that condition is expected to continue for several decades."

Do you agree with that statement?

A. Yes, I do.

Q. In fact, you helped write it, didn't you?

A. I authored this piece; yes, sir. That's our understanding

[3-128]

of it, the demographics.

Q. In terms of the monthly cash flow, does that average about \$75 a month—\$75 million a month at this time?

A. At—at the time I gave my deposition, that was about it, and because of salary increases and membership increases and so on, it's in the 80's now.

Q. Eighty what, sir?

A. Mid-80's.

Q. Could we say \$85 million a month as an approximation?

A. Eighty-three to 85.

Q. All right. And you're anticipating my question because we did depose you. Your current obligations by month, the demand made against that cash per month, approximately how much are those?



A. I believe they are about 39 million now.

Q. All right. Is it correct then to say that the differential is about \$46 million a month?

A. It would average about that now.

Q. All right. I —.

(Pause)

I think we have all heard that nine percent as an assumed investment rate of return. Can you tell us what you actually realized on investments last year?

A. Not precisely at this stage.

Q. Can you approximate it?

[3-129]

THE COURT: Are you talking about calendar year basis?

MR. MELVIN: Yes. If that's the way the figure works in Mr. Yelton's business.

A. The calendar year total return should be between 25 and 30 percent.

BY MR. MELVIN:

Q. Okay. And what are the components of that figure, please?

A. Income in the form of dividends and interest payments, income from real property and changes in market value which constitute, of course, the major part of the 25-plus rate of return.

Q. Now, of course, you don't guarantee us that you're going to do that well next year, do you, Dr. Yelton?

A. No, sir.

Q. What do you expect might be next year's performance?

THE COURT: Talking about calendar year '86?

MR. MELVIN: Yes. I'm sorry, this year's performance?

THE COURT: All right.

A. I wish I knew specifically, we would come out way ahead if we knew where the markets were going. Very likely above the nine percent actuarial return.

. . .

[3-134]

## REDIRECT EXAMINATION

BY MR. MELVIN:

Q. When one takes account of these significant fluctuations in the performance of the fund, net loss one year, 25 or 30 percent the next year, is it correct to say that since 1981, Mr. Yelton, your managers have averaged a 14.9 percent return on investments?

A. Yes, sir.

. . .

---

[Caption Omitted In Printing]

VOLUME IV

TRANSCRIPT OF FOURTH DAY OF  
IMPACT HEARING

[February 10, 1986]

Vol. IV

[3]

LAWRENCE J. GIBNEY

was called as a witness for the Plaintiffs.

. . .

DIRECT EXAMINATION

BY MR. MELVIN:

. . .

[4]

Q. All right, sir. At the present time what is your position with the State of Florida, please?

A. My position with the State of Florida is that of State Retirement Actuary.

Q. For how long have you held the position of State Retirement Actuary?

A. Since August of 1984.

Q. All right, sir.

A. '74, beg your pardon.

. . .

Q. Are you in fact an actuary, Mr. Gibney?

A. Yes, I am.

Q. You are an enrolled actuary?

A. Yes, I am.

Q. And you are a member of the societies to which practicing actuaries usually are members of?

[5]

A. Yes.

. . .

[6]

Q. Okay. That will enable me to ask you more brief questions.

You recall, do you, the testimony of Mr. Yelton who administers the investments for the Florida Retirement System?

[7]

He stated to us that last year's yield on investments was in the range of 25 or 30 percent. Do you recall that testimony?

A. Yes, I do.

Q. All right. And for the sake of simplicity, I would ask you to assume that that translates into perhaps a \$2 billion increase in—in fund assets. By the way, do you have any—does that strike you as an unreasonable estimation?

A. Two billion?

Q. Yes.

A. Will you clarify to me how you arrived at it?

Q. Assuming 25 to 30 percent is added to a figure of around \$8 billion.

A. That's —.

THE COURT: You mean that's—you don't need an actuary to take one-fourth of eight is two.

MR. MELVIN: Okay.

THE COURT: Assume that.

MR. MELVIN: Assume that.

THE COURT: I thought you were asking him if he agreed with J. Yelton's—you know, estimate of the 25 or 30. Excuse me.

MR. MELVIN: No. That's a predicate for this next question. I'm sorry.

BY MR. MELVIN:

Q. Now, having that in mind, Mr. Gibney, my question to you

[8]

is this: I would like you to assume that it's the decision of this Court that discounted present value term, the sum of \$200 million is directed to be taken out of the fund and that it is to be taken from last year's investment gains.

A. Yes.

Q. Knowing what you know about last year's investment gains, tell the Court what impact if any you can envision resulting from such a decision.

A. Well, if we remove 200 million from the trust assets, we are required to increase contribution rates in order to replace that 200 million. And the impact, to me, if you increase the contribution rates in accordance with

the constitution amendment, then there wouldn't be any impact.

Q. Assuming therefore that the policies as you know to be in effect are followed, there will be no impact, will there?

A. Right. Yes, sir.

• • •

[10]

Well, let me get back to that \$2 billion increase. The assumption of nine percent earmarked a portion of that increase as what we normally would expect.

Q. All right.

A. Right.

Q. All right.

A. No, getting back—.

Q. You would agree, however, that in the figure of \$2 billion, which is derived from an estimated 25 or 30 percent investment yield of that year, that's quite a bit over nine percent?

A. Yes. Yes, it is, but you're talking about one year.

Q. That's right.

A. You're talking about a one-year assurance.

Q. And you heard Mr. Yelton testify that his five-year average after the last five years was 14.9 percent?

A. Conceivably, yes.



[11]

Q. In light of figures of those types, don't you agree that it is speculative to try to point to when or to speculate exactly how an impact would result from a judgment of only \$200 million in this case?

A. I would say it would be difficult to determine when an impact would occur.

Q. All right, sir.

A. But there would be an impact if there was not provisions made to increase the contribution rates which we are required to do.

. . .

[15]

Q. Okay. You had proposed the adoption of unisex tables by the State of Florida as early as November of 1976, did you not, sir?

A. The letter you are referring to in '76 I was bringing to the attention of the State Retirement Director at that time what I perceived to be a trend in the industry.

Q. Is that all it was?

A. Well, actually—actually the purpose of that note was to bring to his attention the use of a different mortality table and the use of such mortality table for unisex purposes.

Q. Mr. Gibney, is it not a fact that before the memorandum in question, which is in November of '76, before you wrote that memo, you attended a seminar called Up '84, which was a forward-looking seminar for the discussion of matter of interest of actuaries, didn't you?

A. It wasn't a seminar entitled Up 1984.

Q. What was the name of it?

A. The name of it was—

(Pause)

[16]

I attended a meeting of the Joint Meeting of the Conference of Actuaries in public practice and the Society of Actuaries, and this paper, Up 1984, was presented at that meeting.

Q. All right. Now, that paper called Up '84, was it a forward-looking discussion of matters such as unisex tables as they would affect the practice of actuaries?

A. Well, some—to a degree I would have to agree that it was a forward-looking paper, yes.

Q. All right, sir. Now, it was a presentation by an organization called the Wyatt Company. Will you tell us who the Wyatt Company is?

A. The Wyatt Company is a firm of consulting actuaries.

Q. Is it a respectable organization?

A. Very reputable firm.

. . .

Q. As reputable, from where you sit, as Tillinghast, Nelson and Warren is a reputable firm?

A. Yes.

Q. Okay. Upon—upon participating in that conference, you came to the conclusion, did you not, that the information you had secured about whether to continue the

use of unisex tables was of monumental importance for the Florida Retirement System; is that true?

[17]

A. Yes.

Q. And then you prepared and you sent to your superior, Mr. Robert L. Kennedy, the memorandum dated November 16, 1976?

A. Yes, yes, sir.

. . .

[21]

Q. All right, sir. On May 19, 1978 an item we have marked as Exhibit 21, it appears that you again wrote Mr. Kennedy. Can you confirm that that's a memo that you wrote to him?

A. Yes, that's the one I wrote.

Q. All right, sir. I would like to direct your attention to the next-to-the-last sentence. It is the last sentence of the next-to-the-last full paragraph.

THE COURT: This is May of '77?

THE WITNESS: '78.

MR. MELVIN: This is May 19, 1978, Your Honor.

BY MR. MELVIN:

Q. Do you see that sentence, "In light of—"?

[22]

A. Yes, I see it.

Q. All right. Its first words are "In light of the recent Supreme Court decision." That's Manhart you're talking about, isn't it?

A. Yes, sir.

Q. The statement is:

"In light of the recent Supreme Court decision it is not a question of if, but when we adopt such factors."

What response, if any, did you get from Mr. Kennedy to that statement by you?

A. I can't recall any comment concerning this note of May 1978.

Q. Now, from—we now have moved from November of '76 into May of '78, and we have two memos by you, Mr. Gibney, and you recall no meetings in which your recommendations were discussed. Do you know of any other studies, any other activity pertaining to unisex tables in this same period of time?

A. I can't recall of any meetings addressing this issue specifically.

Q. On August 9th, 1978—do you have a memorandum of that date before you?

A. Yes, I do.

Q. All right, sir. We have marked that memo as Exhibit 22. Is that your memo to Mr. David Kerns?

A. Yes, it is.

[23]

Q. The subject of this memo also is the propriety of using unisex tables, is it not?

A. Yes, it is.

Q. Why did you write Mr. Kerns?

A. I believe that I was directed by the State Retirement Director to.

Q. Who was who, sir, at that time?

A. Mr. Robert Kennedy.

Q. Go ahead.

A. To keep the general counsel apprised of what was happening.

Q. When you wrote the general counsel, I call your attention to this sentence at the bottom of the page:

"This particular Supreme Court decision—" let me pause again. We are talking about Manhart, aren't we?

(Pause)

A. I am looking for your reference.

Q. Bottom of the page.

A. "However"?

Q. Yes, sir.

A. Okay. Yes, we are talking about Manhart.

Q. Now, in this memo to Mr. Kerns you say:

"This particular Supreme Court decision did not address the question of the use of sex-based actuarial tables in determinig actuarial equivalence."

[24]

Now, isn't that the same actuarial equivalence that you were talking about in that memorandum from two years before, 1976 memorandum; same ideas, are they not?

A. Same ideas, yes.

Q. All right. You said the Supreme Court decision did not address this question, and, accordingly, until the issue is resolved, we feel the use of sex-based actuarial tables is appropriate. Can you explain to us why you took that term and said to Mr. Kerns that you thought you might go ahead and continue to use these tables?

A. Well, the reason for my position, as stated to Mr. Kerns, was I felt that the recent Supreme Court decision, known as Manhart, did not address the issue of unequal benefits.

Q. But you had come to the conclusion that the things it might have left unaddressed could be fairly forecasted by reading between the lines and that ultimately these unisex tables had no future. You have come to that conclusion, haven't you?

A. I came to that conclusion myself, yes. But the thing is I had no power to make any change. All that I could do was to point out what was going on.

Q. All right.

A. And I wasn't satisfied that the Manhart decision addressed the issue of unequal benefits at time of retirement.

Q. But you feel that you knew what would happen when that



[25]

issue was addressed, didn't you? You knew what the outcome was going to be, in your opinion?

A. In my judgment, I had no idea what may happen, yes.

• • •

Q. Plaintiffs' Exhibit 23 looks like it was something you prepared for your file in that it doesn't have the typical formalities of the government memorandum. Is this a file memorandum that was prepared by you, Mr. Gibney? Do you have that there?

A. I don't have a copy of it.

Q. Would you take a look at it a moment?

(Pause)

Is that a copy of a memorandum you prepared reflecting your ideas and thoughts as of about November 29, 1978?

A. Yes. It has my initials on the last page, but I don't

[26]

believe it was ever put in memorandum form.

Q. The subject of this is the Manhart case, and then something you called a court case of Oregon, correct?

• • •

A. Correct.

• • •

Q. In point of reference to earlier events, this is four months or so just after you wrote Mr. Kerns, right?

A. Yes.

Q. Okay. I'd like to direct your attention to the last two sentences on Page 1 beginning with the expression "Although the facts of the case —." Do you see the expression there, "Although the facts of the case —"?

A. Yes.

[27]

Q. "Although the facts of the case deal with a defined contribution plan, the extension of the Court's action could inevitably lead to the abolition of sex segregated tables in determining equivalent benefits when election of an option is permitted. Consequently, it is my opinion that eventually we will be forced to adopt the so-called unisex tables so that both male and female members receive the same benefits regardless of their sex."

Does that accurately reflect the feeling that you had at that time?

A. Well, there is an error in that sentence.

Q. Is there? Typographical error, or what is the error?

A. I say "defined contribution." The Manhart case is a defined benefit.

Q. All right, sir. Except for that reversal of concept dealing with the conclusion that you expressed, "It is my opinion that eventually we will be forced to adopt the so-called unisex table," et cetera. Did that reflect a conclusion that you reached at that time?

A. Yes, it did.

Q. A conclusion that you held thereafter?

A. Yes.

Q. Turn to the last page of that same memo, would you, please?

(Pause)

[28]

You make the statement in the last words of the first paragraph, first sentence of that final paragraph, "But the effect on retirement systems as a whole will be negligible." Do you see that statement?

A. No, I don't.

Q. May I? It's on the last page of your memo, the last paragraph. See the expression here, "But the effect —."

A. Oh. Okay.

Q. Are you referring to financial impact there?

A. I don't know what—I assume I was concerned with financial impact.

Q. Okay, sir.

Would it not be fair to say, Mr. Gibney, based on the things you learned in '76 when you went to the seminar and the study that you made of the Manhart case two years later when it came out, that from and after Manhart it was your view that the continued use of sex-based mortality tables would be a highly questionable practice?

A. Well, my opinion at that time, during that period of time, I thought that it eventually would be required to go to a unisex table. But up to that point in time we had no guidance. The Manhart decision did not resolve it, as far as unequal benefits.

Q. But you felt fairly sure how the question would be resolved when and if this particular feature was presented to

[29]

the Court, didn't you? You felt it would be answered in the negative?

A. I thought there would be a mandate that we—that a future judicial decision would be rendered which would require us to go to a unisex table. That was my thinking at the time.

Q. And therefore is it not fair to say that throughout this period of time that it was your view that this was a highly suspect employment practice?

A. Well, insofar as employment practice, I can't answer that.

Q. I'm sorry. I will withdraw that. That's a legal phrase from the statute.

It was a highly suspect practice, wasn't it, in your view?

A. Continuation of the sex segregated?

Q. (Nodded affirmatively)

A. Highly suspect, you might put it in those words. However, we had no alternative, we had no direction to go to a unisex table up at that point in time.

Q.

. . .

If we were to assume that the decision in Manhart was the first real word of warning that might have caused one to suspect the practice should be changed, let's forget what you learned two years earlier, let's assume that it was Manhart in '78 that—Manhart in '78 was the—the definitive word,

[30]

if you would just assume that with me for a moment. I want to talk about how you shift on to a unisex table. If at that moment the State of Florida had put all of the people on a unisex basis, and if you will assume with me for a moment that the Court would not have imposed retroactive liability on you at that early stage, insofar as all the future costs go, is it not correct that you can shift to a unisex basis without having future liability, you blend the obligations between the parties in a fashion that it is cost-free?

A. That may or may not be true. All depends on the type of unisex table you adopt.

Q. Let's say that you have adopted then the type that you did adopt in 1983. Then is the answer to my question yes, it would be cost-free?

A. Using the methodology that we employ for the 1983 unisex factors, I would have to say that it would be cost-neutral because it was a reflection of the experience of the Florida Retirement System in the area of option elections.

. . .

[33]

Q. You write Mr. Andy McMullian several months before September of '81, specifically on May 21st of 1981, talking about Hughlan Long's complaints about unisex tables, didn't you?

A. Yes, I did.

Q. And you suggested early implementation of unisex tables again to Mr. McMullian, didn't you?

A. Yes, I did.

Q. And you told him specifically:

"My reason for suggesting early implementation on our own is to avoid any possible retroactive liability that might arise."

[34]

You told him that, didn't you?

A. Yes, I did.

Q. And you told him very specifically that:

"It's conceivable we would have to make adjustments back to the date of the Manhart case which occurred,"



you said, "1978. We would have to increase the male benefits, but I have my doubts as to whether we would be successful in decreasing the female benefits; hence, there could be retroactive liability."

Did you get any response from Mr. McMullian to that warning?

A. I don't recall specifically discussing this memo with him; however, we had numerous discussions on that issue of option factors and unisex tables and what have you, and there may have been questions on his behalf directed to this memo, but I can't recall them specifically.

• • •

[53]

#### REDIRECT EXAMINATION

BY MR. MELVIN:

• • •

[56]

Q. Yes. Now, when you made that statement, "Because of the general thrust taken by the Equal Employment Opportunity Commission, there is now a very strong possibility," et cetera; is that Mr. Gibney talking or is that Mr. Gibney just passing along some information he obtained elsewhere?

A. That's Mr. Gibney passing along information that he obtained elsewhere.

Q. Okay. Then go to the last page, Page 5, where we state the conclusion, second paragraph:

"Since our option factors make this distinction, it would seem prudent to resolve our course of action before

the 1977 valuation started."

Now, is that Mr. Gibney talking or Mr. Gibney telling us what others found?

A. No, that's Mr. Gibney talking.

Q. And now at the bottom of the same page:

"In light of the strong possibility of the federal government mandating the use of such tables, I would recommend we consider going to the new basis for option reduction factors and resolve this differential in the benefits between the sexes once and for all."

[57]

Is that Mr. Gibney talking or what Mr. Gibney is telling us what other people have said?

(Pause)

A. That's Mr. Gibney talking.

• • •

THE COURT: Uh-huh. For this layperson here, does that translate for me into something that, all other things

[58]

being equal, had the State acted upon your recommendation, that there would not have been any increase in the contribution rate from all of the 1,100 or so contributing agencies?

THE WITNESS: Yes. Yes; that's correct.

• • •

THE COURT: Now, let me ask you, from an actuarial standpoint and your view of the rules and regulations as you believe you are operating under, was there anything that

[59]

prohibited Florida in 1976, '78, going to a unisex table for their retired employees?

THE WITNESS: Not that I'm aware of.

• • •

---

DEFENDANTS' EXHIBIT 1

(SEAL)

DEPARTMENT OF HEALTH, EDUCATION,  
AND WELFARE  
REGION IV

101 MARIETTA TOWER  
ATLANTA, GEORGIA 30323

OFFICE FOR CIVIL RIGHTS

October 30, 1978

Mr. Robert Kennedy  
Administrator  
Florida Retirement System  
Carlton Building  
Tallahassee, Florida 32304

Dear Mr. Kennedy:

Re: Complaint # 04-79-1016

This will notify you that we have received a complaint alleging that the Florida Retirement System is engaged in discriminatory conduct in violation of Title IX of the Education Amendments of 1972 in the optional retirement pension benefits for males. However, since we cannot schedule the complaint for an immediate investigation, it has been placed in our backlog of complaints at this time.

You will be contacted by the Elementary and Secondary Education Division when the complaint is removed from the backlog for investigation.

Sincerely yours,

/s/ John E. Tolbert  
Deputy Director  
Office for Civil Rights, Region IV

---

## DEFENSE EXHIBIT 2

(SEAL)

DEPARTMENT OF HEALTH, EDUCATION,  
AND WELFARE  
REGION IV101 MARIETTA TOWER  
ATLANTA, GEORGIA 30323

## OFFICE FOR CIVIL RIGHTS

November 29, 1978

Mr. Robert Kennedy  
Administrator  
Florida Retirement System  
Carlton Building  
Tallahassee, FL 32304

Dear Mr. Kennedy:

Re: Complaint # 04-79-1038

This is to notify you that we have received a complaint alleging that the Florida Retirement System is engaged in discriminatory conduct in violation of Title IX of the Education Amendments of 1972 in the optional retirement pension benefits for males. However, since we cannot schedule the complaint for an immediate investigation, it has been placed in our backlog of complaints at this time.

You will be contacted by the Elementary and Secondary Education Division when the complaint is removed from the backlog for investigation.

Sincerely yours

/s/ John E. Tolbert  
Deputy Director  
Office for Civil Rights  
Region IV

cc: Chief State School Officer

## DEFENDANTS' EXHIBIT 4

(SEAL)

STATE OF FLORIDA  
DEPARTMENT OF ADMINISTRATION  
OFFICE OF THE SECRETARY  
ROOM 311 CARLTON BUILDING  
TALLAHASSEE

32304

NEVIN G. SMITH  
Secretary of AdministrationBOB GRAHAM  
Governor

August 17, 1979

Honorable Harry A. Johnston, II, Chairman  
Subcommittee E- Personnel, Retirement  
& Collective Bargaining  
210 Senate Office Building  
Tallahassee, Florida

Dear Senator Johnston:

As you are aware, there has been concern on the part of retirement administrators as to whether the continued use of separate sex tables is appropriate for determining actuarial equivalent. As yet, the use of separate tables or a combined table has not specifically been resolved by the courts. However, an interpretation or an extension of the reasoning behind the "Manhart Decision" would lead one to believe that a combined or "unisex" table may eventually be mandated.

To keep ourselves informed as to the current thinking among retirement administrators, we recently conducted a survey, a copy of which is attached, along with a copy of the questionnaire that was used. There are only a few states, i.e., Colorado, Idaho, Maine, Montana and



North Dakota, currently using a "unisex" table. For the most part, it's an attitude of—wait and see—that prevails in most states.

Interestingly, the following language appears in Section 20(9) of CS/HB 1045—Local Government Financial Emergency and Accountability Act, which was passed by the 1979 Legislature:

"(9) No plan shall discriminate in its benefit formula based on color, national origin, sex or marital status. Nothing herein shall preclude a plan from actuarially adjusting benefits or offering options based on sex, age, early retirement or disability."

In light of this provision in the Florida Statutes and the prevailing attitudes of judicial decisions, you may wish to have your Committee study this subject further.

The Division of Retirement was notified by letter dated October 30, 1978, by the Office of Civil Rights of Region IV, Department of Health, Education, and Welfare, Atlanta, Georgia, that it had received a complaint alleging that the Florida Retirement System is engaged in discriminatory conduct in violation of Title IX of the Education Amendments of 1972 in the optional retirement benefits provided for male members. This letter states that this complaint has been placed in a backlog of complaints and is not scheduled for immediate investigation. A copy of this letter is attached.

The Division of Retirement has prepared a brief discussion paper regarding sex discrimination in Florida's retirement systems, and a copy of this study is attached. We are also attaching a copy of a letter sent by the State Retirement Actuary to one of our members relative to the

difference in Option 4 benefits for a male and female member retiring at the same age.

If you have any questions regarding the material we are sending you, or if we can be of further assistance to you in your study of this matter, please let me know.

Sincerely,

/s/ Nevin G. Smith  
Secretary of Administration

NGS:Kmj  
Attachments

---

## DEFENDANTS' EXHIBIT 5

(SEAL)

DEPARTMENT OF HEALTH, EDUCATION,  
AND WELFARE  
REGION IV101 MARIETTA TOWER  
ATLANTA, GEORGIA 30323

## OFFICE FOR CIVIL RIGHTS

November 16, 1979

Mr. Robert Kenendy  
Administrator  
Florida Retirement System  
Carlton Building  
Tallahassee, Florida 32304

Dear Mr. Kennedy:

Re: Complaints # 04-79-1016 and # 04-79-1038

This is to inform you that our investigation of the above-referenced complaints has been completed. The complaints alleged discrimination on the basis of sex in individual and family benefits to male teacher retirees of the Pinellas County, Florida School System.

We have determined that the allegation which charges violation of the Regulation Implementing Title IX of the Education Amendments of 1972 is invalid and that there has been no violation. Our determination was based upon the finding that the Pinellas County, Florida School System employees participating in the Florida State Retirement System, irrespective of sex, make equal contributions to the program; but, a difference exists in provisions in the optional pay back program. This program provides retirement payments to the employee upon retirement and, if the employee dies, to the surviving spouse. Male retirees

who select this option receive smaller payments than female retirees who select the same option because the payments are determined from actuarial calculations based upon life expectancy of the spouse.

Section 86.56(b)(2) of the Title IX Regulation states:

*Prohibitions.* A recipient shall not: (2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex.

Based upon the equal contribution of male and female employees, there is no Title IX violation.

We are taking action to close our files on this case and informing complainants of our conclusions.

If there are questions relative to this complaint, please contact us.

Sincerely yours,

/s/ William H. Thomas  
Director  
Office for Civil Rights  
Region IV

cc:

Dr. Gus Sakkis, Superintendent  
Pinellas County School District

---

## DEFENDANTS' EXHIBIT 13

## DEPARTMENT OF ADMINISTRATION

(SEAL)

NEVIN SMITH 435 Carlton Building BOB GRAHAM  
 Secretary of Tallahassee, Florida Governor  
 Administration 32301  
 (904) 488-4116

July 10, 1984

Honorable Ernest Ellison  
 Auditor General  
 Office of Auditor General  
 231 Holland Building  
 Tallahassee, Florida 32301

Re: Audit Report No. 10362

Dear Mr. Ellison:

This is in response to your letter of June 25 acknowledging receipt of my letter of June 6 which transmitted the response of our Consulting Actuaries (Tillinghast, Nelson & Warren, Inc.) to your "Performance Audit of the 1983 Actuarial Valuation of the Florida Retirement System". Also, you call to my attention that you need an official response from the Department of Administration to your audit findings (Audit Report No. 10362) and that said response should have been submitted to you on or before May 7, 1984, in accordance with Section 11.45(6)(d), F.S., which requires submission of response within 20 days of receipt of the audit report by the agency.

Your attention is directed to Section 112.658, F.S., from which your specific authority is derived to make a determination of the compliance of the Florida Retirement System with the provisions of Chapter 112, Part VII, F.S. This law states "... The Auditor General shall employ the same actuarial standards to monitor the Division of Retirement as the Division of Retirement uses to moni-

tor local governments." This agency does not impose a 20-day limit response time on the local governments when the Division of Retirement performs its responsibility under this law and conducts a review of an actuarial valuation prepared and submitted by a local government agency. To do so would be impractical considering the technical aspects of actuarial reports and inappropriate under the law and rules promulgated thereunder [see 22D-1.05(1)(a), F.A.C.]. You will note that local agencies have 60 days to respond and that this time may be extended if it is determined by the Division of Retirement that reasonable progress is being made by the local agency. Therefore, we would submit that the Office of the Auditor General (in performing its responsibility under this law to monitor the State program and make a determination of compliance on the part of the Florida Retirement System with the provisions of Chapter 112, Part VII, F.S.) is performing an actuarial review and not a "performance audit", notwithstanding your general authority to perform financial and performance audits under the provisions of Section 11.45, F.S., and that the Department of Administration is not in violation of the 20-day response requirement.

Further, your staff has been advised in the past and on more than one occasion of our concern with your 20-day response time requirement, and your staff was told the Department of Administration would not respond officially to your review of the 1983 FRS Actuarial Valuation until our Consulting Actuaries had prepared a response to your Audit Report No. 10362. Consequently, we do not understand why your office continues to make this an issue. Nevertheless, we are pleased to provide your office with



the following specific comments which represent the official position and response of the Department of Administration:

1. Relative to your comments regarding the key economic assumptions used in the 1983 FRS Actuarial Valuation, i.e., investment return rate of 9.0% and salary increase rate of 7.5%, we are in complete agreement with the response of our Consulting Actuaries. Specifically, as to your concern with the spread of 1.5% between the rate of interest earned on investments and the rate of salary increases, such spread is common among retirement plans (see enclosed copy of report on this subject from the Greenwich Research Associates dated January 30, 1984). Based on our expectations of the economy for the future, we believe that the 1.5% spread is more realistic and therefore more appropriate than the .5% spread which was used in the 1980 Valuation where an 8.5% investment return rate and an 8.0% salary increase rate were used.
2. We agree with our Consulting Actuaries' response to your observations and recommendations pertaining to the restricted use of a "dedicated bond portfolio" investment strategy by the State Board of Administration (SBA). You should understand that there already exists a close working relationship between the SBA, the Division of Retirement and our Consulting Actuaries, and that many meetings and reviews have been held with the SBA regarding the cash flow matching technique of dedicated assets to the liabilities for the retired lives of the FRS Trust Fund. We plan to continue working together to monitor the investment strategy of this aspect of the FRS portfolio.
3. The method used by our Consulting Actuaries to amortize the Unfunded Actuarial Accrued Liabil-

ity (UAAL) of the FRS Trust Fund over a 30-year period is the "level percentage of payroll" method which was agreed upon and endorsed by both the Executive and Legislative branches of government in 1978 when the FRS was first funded on an actuarially sound basis as required by Article X, Section 14 of the State Constitution. Since that time, there have been two additional triennial actuarial valuations prepared and submitted to the Legislature for appropriate action as required by law (the 1980 and the 1983 FRS—Actuarial Review). On both occasions the Legislature has chosen to continue the amortization of the UAAL through the payroll growth method which was adopted after the 1977 FRS Actuarial Valuation, even though this approach permits the amount of this debt (\$6.34 billion currently) to grow until the year 1994 when it will reach \$7.73 billion, and thereafter be reduced each year until this debt is eliminated completely by the year 2013. As stated in our response to your 1980 Valuation Review, we will continue to monitor this aspect of funding the FRS, and if we have any reason to question or doubt that the "level percentage of payroll" method is not best for retiring this debt of the FRS, we will be the first to make recommendations to the Legislature for appropriate changes regarding funding of the UAAL of the FRS Trust Fund.

4. As to the other subjects commented on in your review, you will note that most of your concerns were addressed by the 1984 Legislature with the passage of SB 153—Section 3 and Section 4 (Chapter 84-266, Laws of Florida). Obviously, we intend to comply with these amendments to the FRS law, Section 121.021(24) and Section 121.031(3) and (4), F.S. (see enclosed copy of this legislation).

If we can be of any further assistance or should you have any questions regarding the above response, please advise.

Sincerely,

/s/ Nevin G. Smith  
Secretary of Administration

NGS/Mna  
Enclosures

---

DEFENDANTS' EXHIBIT 14  
DEPARTMENT OF ADMINISTRATION

(SEAL)

NEVIN SMITH 435 Carlton Building BOB GRAHAM  
Secretary of Tallahassee, Florida Governor  
Administration 32301  
(904) 488-4116

September 1, 1981

Memorandum

TO: David V. Kerns  
FROM: Samantha Boge  
RE: Adoption of Unisex Actuarial Tables

After reviewing the series of articles provided by the Division of Retirement as well as the landmark decision in *City of Los Angeles v. Mankart*, 98 S. Ct. 51 (1978), I can only conclude that the Division would be well advised to convert from sex-distinct actuarial tables to unisex tables as soon as is practical.

As you know, the *Mankart* decision specifically only disapproved of an employer's requirement that females make larger monthly contributions to a retirement system than their male counterparts. Equal benefits were received by male and female retirees. Of course, the employer relied on sex-distinct actuarial tables in arriving at the requirement of unequal contributions. The Court in *Mankart* reasoned that an individual woman could not be treated differently from other (male) employees simply on the basis of a forbidden classification—namely sex—even though the assumed generalization about that class of persons was true. In other words, the simple fact that women as a class live longer than men is no justification

for an employer to treat an individual woman employee differently than a man similarly situated. After all, women who smoke, drink or have high pressure jobs may possess a far shorter lifespan than an average male. Title VII requires that *individual* employees be treated equally without regard to their race, sex, etc.

Using sex-distinct actuarial tables resulting in higher monthly benefits for female retirees and their families than male retirees receive violates Title VII in my opinion, as surely as unequal monthly employee contributions. While such use may be permissible by insurers generally, it is not permissible by employers like the State of Florida.

I feel constrained to raise one final issue as a result of the Supreme Court's admonition to treat every employee as an individual. Is it only a matter of time until actuarial tables, unisex or not, using age as a factor, are forbidden by Courts interpreting the various Civil Rights laws? As you know Florida law includes age as a forbidden basis for discrimination in the employment arena. Seemingly, basing retirement benefit amounts on age would thus be impermissible for an employer.

SB/as

---

DEFENDANTS' EXHIBIT 16  
DEPARTMENT OF ADMINISTRATION  
Division of Retirement

(SEAL)

BOB GRAHAM Governor	LEGAL OFFICE ADDRESS	A. J. McMULLIAN III State Retirement Director
NEVIN SMITH Secretary of Administration	Cedars Executive Center 2639 North Monroe Suite 207 C—Box 81 Tallahassee, Florida 32303	AUGUSTUS D. AIKENS, JR. Division Attorney

(904) 487-1230

July 10, 1981

MEMORANDUM

TO: Mr. Andy McMullian

FROM: Diane K. Kiesling

Re: Use of Sex-Segregated Mortality Tables

Title VII of the Civil Rights Act of 1964 provides that: [i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin . . .

In the landmark case, *City of Los Angeles v. Manhart*, 435 U.S. 702, 98 S.Ct. 51 (1978), held that unequal contribution rates used to fund equal benefits. The Court said that the words "individual" meant that any distinctions must be based on individual differences and not on the accepted concept that women live longer than men. It was argued that the different contributions were based on longevity, not sex. But the Court concluded that "one



cannot say that an actuarial distinction based entirely on sex is based on any other factor other than sex. Sex is exactly what it is based on." In the lower court, retroactive relief was awarded, but the Court found such relief to be inappropriate in this case because:

- (1) the courts had been silent;
- (2) the government agencies had conflicting views;
- (3) formally amending a retirement plan is a slow process; and,
- (4) major unforeseen contingencies can jeopardize an insurer's solvency and, thus an insured's benefits.

Following *Manhart*, several cases have extended the Title VII protection to cases where contributions are equal, but annuity benefits are unequal because they are calculated based on sex-segregated mortality tables. The conclusion has been that the thrust of *Manhart* envisaged a single rate or unisex rate and that sex differentiated mortality tables are not permissible. See *Equal Employment Opportunity Commission v. Colby College*, 589 F. 2d 1139 (1st Cir. 1978); *Spirit v. Teachers Insurance and Annuity Assoc., et al*, 475 F. Supp. 1298 (S.D.N.Y. 1979); and *Peters, et al v. Wayne State University, et al*, 476 F. Supp. 1343 (S.D. Mich. 1979).

Another case which has serious potential to harm our system is *Norris v. Arizona Governing Committee*, 486 F. Supp. 645 (D. Ariz. 1980). In that case, further payment of benefits calculated under sex distinct mortality tables was enjoined and the court directed that annuity payments to retired females be adjusted to be equal to similarly situated male retirees.

This brings us back to the concept of retroactivity. The reasons for the Supreme Court's denial of retroactive relief in *Manhart* no longer exist and I suspect that retroactivity is going to start showing up in these types of cases in the future (just as it did in *Norris*). The courts are no longer silent and have not been for more than three years. Government agencies charged with applying the law are no longer in conflict. There has been ample time for formal amendment of retirement plans. Solvency problems can be overcome by implementation of an actuarially sound unisex table.

Based on the judicial decisions set forth above, it is suggested by this writer that the Florida Retirement System adopt a unisex actuarial table as soon as practicable. I would further point out that Section 121.091(6)(b) authorizes the administrator to adopt actuarial tables for the purpose of calculating retirement benefits. There is no necessity for legislative action prior to adoption of so-called unisex tables. This change can be achieved solely by amendment of the FRS rules.

Please feel free to call upon me if further information is needed.

DKK:lb

---

## DEFENDANTS' EXHIBIT 27

Department of Administration

(SEAL)

BOB GRAHAM Governor	Division of Retirement	A. J. McMULLIAN III State Retirement Director
NEVIN SMITH Secretary of Administration	Cedars Executive Center Building C 2639 North Monroe Street Tallahassee, Florida 32303 (904) 488-5541	LEWIS M. DENNARD Assistant State Retirement Director
	July 21, 1983	

## MEMORANDUM NO. 83-88

TO: All Florida Retirement System Reporting Units

FROM: A. J. McMullian III, State Retirement Director

SUBJECT: Notice of Change in Actuarial Factors for Retirement Options 2, 3 and 4

On July 6 the U.S. Supreme Court ruled in the case of *Arizona Governing Committee, et al vs. Norris* that the use of sex-distinct actuarial tables which produce smaller benefits for either men or women where equal contributions have been paid is in violation of Title VII of the 1964 Civil Rights Act and is prohibited. The Court's remedy is for retirement systems to adopt actuarial tables which eliminate this impermissible distinction. Persons retiring August 1, 1983 and thereafter are affected by this ruling.

The Florida Retirement System has in the past used sex-distinct actuarial tables for determining benefits under

retirement Options 2, 3 and 4; however, effective August 1, 1983 new actuarial factors have been adopted. These new "unisex" actuarial tables will be used for persons whose effective date of retirement is August 1, 1983 or later and will result, in some instances, in significant differences in the amount of the monthly retirement benefit previously estimated under Options 2, 3 and 4. While this change has no effect on either male or female members retiring under Option 1, the new actuarial factors generally result in smaller benefits for female members and greater benefits for male members electing retirement under either Option 2, 3 or 4 than would have been the case under the former sex-distinct tables which have been repealed.

As soon as the new tables are available, we will make them available to you.

AJM:Dje

---

**PLAINTIFFS' EXHIBIT 12**  
**FLORIDA RETIREMENT SYSTEM**  
**INVESTMENT PORTFOLIO DISTRIBUTION**

End of DECEMBER 1985  
(millions)

EQUITY—Stocks		\$4,880.7	48.6%
Internally Managed	\$2,370.9		
Active Core	\$2,017.3		
Discretionary	\$353.6		
Externally Managed	\$2,509.8		
Index Fund	\$1,307.3		
Discretionary Mgrs	\$1,202.5		
Futures	\$0.0		
EQUITY—Real Estate		\$607.5	6.1%
FIXED INCOME		\$4,181.8	41.7%
Internally Managed	\$2,462.5		
Externally Managed	\$1,719.3		
Futures	\$0.0		
CASH		\$362.4	3.6%
Internally Managed	\$191.9		
Cash Portfolio	\$151.4		
Bond Portfolio	\$10.2		
Equity Portfolio	\$30.3		
Externally Managed	\$170.5		
Bond	\$29.1		
Equity	\$137.3		
Over-Write	\$4.1		
Futures	\$0.0		
Contracts	\$0.0		
Cash	\$0.0		
<b>TOTAL</b>		<b>\$10,032.4</b>	<b>100.0%</b>

**PLAINTIFFS' EXHIBIT 13**  
**FLORIDA RETIREMENT**  
**SYSTEMS BULLETIN**

SEPTEMBER 1984

Vol. 10, No.1

**IN MEMORY OF A FRIEND**

Max Kelley, a Division of Retirement employee for 22 years, died on June 14, 1984, after a brief illness. He was a native of Urbana, Illinois, and a Tallahassee resident for 34 years.

As Special Projects Coordinator, Max conducted seminars on retirement throughout the state, helping many members and employers to better understand the system. He also conducted workshops and orientation sessions for employees of the Division.

His career with the Division began under the old Teacher's Retirement System in August 1961 as an administrative assistant. When the Division of Retirement was created in 1971, he became Chief of the Bureau of Benefits, a position he held until being appointed as Special Projects Coordinator in 1979. His leadership and friendship will be missed, especially by the employees of the Division and by the many retirees and members under the FRS who knew him.

**1984 RETIREMENT LEGISLATION**

The 1984 Legislature introduced 99 bills which directly or indirectly affected retirement and were of interest to the Division of Retirement. Of the 99 bills, 17 passed. One bill was a composite of 14 bills, providing amendments to 20 separate provisions of retirement law. The following summary will provide you with general in-



formation about the legislation which passed that may be of interest to you.

#### *Amendments Affecting Members' Benefits*

1. Chapter 84-266, Laws of Florida—An amendment limits the accumulated annual leave that may be used in the Average Final Compensation to 500 hours and prohibits the use of bonuses. This legislation will not be effective until January 1, 1985, and will apply to FRS members who retire on and after that date.
2. Chapter 84-266, Laws of Florida—Amendments were made to the requirements for the purchase of military service for retirement credit and are effective July 1, 1984. Military service credit, which may be brought under 2 separate provisions, was amended in both instances.
  - a. *Credit for Military Leave-of-Absence* is now worded to agree with the Federal Veteran's Reemployment Rights Act, 38 U.S.C.S. 2021 which provides that any person who leaves a position of employment, other than temporary, to enter the armed forces of the U.S., receives a satisfactory completion of service certificate, and applies for reemployment within 90 days after discharge shall, upon reemployment, be considered as having been on furlough or leave-of-absence, whether or not a military leave-of-absence was granted by the employer. The member may now receive more than 4 years of military service credit if the additional years were required for the convenience of the Federal Government; the military service does *not* have to be wartime; there

is no longer a restriction against receiving credit for military service under the Florida Retirement System for the same period of military service used in another pension system; and the member must pay the required employee and employer contributions for the period of the leave, plus interest.

- b. *Wartime Military Service Credit* may be purchased by the member after 10 years of membership in the Florida Retirement System. The 1984 legislation allows members who are also serving in the U.S. Reserve Forces to purchase military service credit even though the member is eligible to receive service credit in another pension plan for the same service. However, the member must pay the total actuarial cost of the increased benefit resulting from the use of military service credit.
3. Chapter 84-266, Laws of Florida—Past service credit for employment in a Multiple Offender Project administered by a State Attorney may be purchased under certain conditions.

#### *Amendments with Fiscal Impact*

4. Chapter 84-266, Laws of Florida—As a result of the 3-year actuarial review, the rates of retirement contributions for some classes of membership will increase, and others will decrease. All rate changes are effective October 1, 1984, as follows:

Regular Class .....	12.24%
Special Risk Class .....	14.67%
Special Risk Administrative Support .....	13.09%

Judicial .....	21.79%
Governor, Lt. Governor, Legislative, Cabinet, States Attorney .....	10.98%
Elected County Officials .....	*16.97%

\*An intervening rate of 20.25% will be charged July 1, 1984-September 30, 1984 for elected county officials. This is the result of 1983 legislation.

5. Chapter 84-266, Laws of Florida—Provisions requiring the forfeiture of retirement benefits by public officers and employees who are found guilty or admit to certain offenses involving a breach of public trust were adopted. The specified offenses are:
  - a. The committing, aiding, or abetting of an embezzlement of public funds;
  - b. The committing, aiding, or abetting of any theft by a public officer or employee from his employer;
  - c. Bribery in connection with the employment of a public officer or employee;
  - d. Any other felony specified in Chapter 838;
  - e. The committing of an impeachable offense;
  - f. The committing of any felony by a public officer or employee who, willfully and with intent to defraud the public, or the public agency for which he acts or in which he is employed, of the right to receive the faithful performance of his duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain, a profit, gain, or advantage for himself or for some other person through the use or

attempted use of the power, rights, privileges, duties, or position of his public office or employment position.

The amendments included the methods by which the retirement systems will be notified of possible forfeiture and the appeal rights for any employee whose benefits are forfeited.

6. Chapter 84-266, Laws of Florida—Actuarial studies of the Florida Retirement System Trust Fund are now required every 2 years instead of every 3 years. This will give the Division and the Legislature the ability to respond more quickly if funding problems are observed. In addition, the new law mandates the following changes:
  - a. The valuation of plan assets will be based on a 5-year averaging methodology such as that specified in the U.S. Department of Treasury Regulations or a similar accepted approach designed to attenuate fluctuations in asset values.
  - b. A narrative explaining the changes in the covered group over the period between actuarial valuations and the impacts of those changes on actuarial results.
  - c. Where substantial actuarial changes in actuarial assumptions have been made, the study shall reflect the results as of the current date based on the assumptions utilized in the prior actuarial report.
  - d. An analysis shall be included of the changes in actuarial valuation results by the factors generating those changes and shall include a reconciliation of

the current actuarial valuation results with those from the prior valuation.

- e. Measures of funding status and funding progress designed to facilitate the assessment of overall solvency of the system will be included and will be used consistently in all actuarial valuations.
- f. Any increase in unfunded liability under the system arising from significant system amendments or changes in assumptions will be amortized over 30 plan years, and any net increase in unfunded liability arising from experience losses or gains, or supplemental retiree benefit increases, shall be amortized within the 15 plan years.

*Amendments Affecting the  
Elected State Officers' Class (ESOC)*

- 7. Chapter 84-11, Laws of Florida—Members of the Elected State Officers' Class (ESOC) who are employed in two positions, one of which is not covered by the ESOC, may retire from the non-ESOC position and continue employment in the ESOC position, receiving retirement benefits and compensation simultaneously. Those members of the Elected State Officers' Class who applied for retirement under the provisions of a similar bill in 1983, but who retired from the same position in which their employment continued, were "unretired" by this legislation.
- 8. Chapter 84-266, Laws of Florida—An officer of the ESOC whose term was or is shortened by legislative or judicial apportionment may purchase service credit after the term of office is completed for the length of

time he would have served had the term not been shortened.

- 9. Chapter 84-266, Laws of Florida—Effective July 1, 1984, members of the ESOC may upgrade service earned previously as an elected county prosecuting attorney to the ESOC with a value of 3% of average final compensation for each year that is creditable, upon payment of the required contributions.

In order to upgrade service, the elected officer must have been filling the elected office prior to the existence of the Florida Retirement System or prior to the position's inclusion in the Elected State Officers' Class. The value of the retirement credit received for such service would increase from the value earned as a regular member to the value earned in the ESOC, upon payment of additional contributions and interest.

Legislation passed in 1983 changed the method by which the cost is computed for purchasing service that is upgraded to the ESOC, effective July 1, 1984. The member must now pay the difference between the total employee and employer contributions actually paid on the gross salary received, but not less than \$1,000 per month, and the total contribution rate required at the time the service was rendered for the class of elected state officers' service being purchased, plus required interest. Any service earned prior to July 1, 1972, may be purchased at the applicable rates in effect July 1, 1972.



*Amendments Affecting Special Risk Members*

10. Chapter 84-266, Laws of Florida—The definition of continuous service was amended so that certain law enforcement officers will not have a break in service (which causes the member to be unable to retire regardless of age when retiring with 25 continuous years of service) if:

- a. the employee was a law enforcement officer as defined in S. 121.0515(2)(a), while a member of the State and County Officers and Employees' Retirement System or the Highway Patrol Pension System, who resigned and was reemployed in a law enforcement position within 12 calendar months of resignation; or
- b. the employee was a state-employed law enforcement officer who resigned to run for an elected law enforcement office and was reemployed as a state law enforcement officer or elected to a law enforcement position within 12 months of the resignation.

The member will not receive retirement service credit for the interim period of time not employed.

11. Chapter 84-266, Laws of Florida—Effective July 1, 1984, the Division of Retirement will no longer require the submission of a copy of the special risk certification required in accordance with S. 943.14, F.S. for law enforcement and correctional officers. The member must continue to satisfy the requirements of the Criminal Justice Standards and Training Commission, and both the employee and employer

must verify that the member is required to be certified on the application.

- 12. Chapter 84-266, Laws of Florida—Current law is amended effective July 1, 1984, to include in the Special Risk Class certified correctional officers who are the supervisor or command officer of a member or members who have special risk responsibilities.
- 13. Chapter 84-266, Laws of Florida—The death benefits provided to the child of a law enforcement officer or firefighter as provided in Chapter 83-115, Laws of Florida were amended to be effective July 1, 1980, and it also provides for the cessation of educational benefits after the child's 25th birthday. The Division of Retirement does not administer these death benefits.

*Amendments Affecting Retired Members*

14. Chapter 84-266, Laws of Florida—The provisions affecting reemployment were amended to be effective next year, July 1, 1985. At that time, retirees will be prohibited from employment with any agency participating in the Florida Retirement System for 12 calendar months following retirement. If reemployed during this period, the retiree must suspend his retirement benefit. After 12 months, the retiree may be reemployed with no limitations. Effective July 1, 1985, the employer of any retiree filling a regularly established position must pay retirement contributions equal to the unfunded liability portion of the regular class membership, of currently 5.71%. The reemployment provisions are applicable to the Florida Retirement

System, Teachers' Retirement System, State and County Officers and Employees' Retirement System and Highway Patrol Pension System, and those who retired under S. 112.05 F.S.

15. Chapter 84-266, Laws of Florida—Retirees are allowed, effective July 1, 1984, to change their joint annuitant under option 3 or 4, whether or not the joint annuitant is living. If living, the joint annuitant must be notified of the change. The retiree's benefit will be recalculated to be the actuarial equivalent of the member's current benefit, based on the age of the member and the new joint annuitant at the time of the change.
16. Chapter 84-266, Laws of Florida—A special group of retirees are eligible to receive a supplementary cost-of-living adjustment which shall be made in October of 1984. In order to be eligible the retiree must:
  - a. have retired prior to January 1, 1976,
  - b. not be receiving nor eligible to receive Social Security,
  - c. receive a monthly benefit as of July 1, 1984 of less than \$1,000,
  - d. have a minimum of 10 years of service credit.

The Division identified approximately 2,000 retirees who should be eligible for this increase, and will send these retirees an application. The remaining possibly eligible retirees will receive a notice requesting they contact the Division if they think they are eligible based on the criteria.

The adjustment received will be a percentage of the October 1, 1984 benefit based on years of service prior

to retirement and years that have elapsed since retirement. The percent multiplied times the October benefit will be as follows:

- a. A retiree with 30 or more years of service will receive 1% multiplied by the number of complete years that have elapsed between retirement and July 1, 1984;
  - b. A retiree with 20, but less than 30 years of service will receive 0.9% multiplied by the number of complete years elapsed between retirement and July 1, 1984;
  - c. A retiree with 10, but less than 20 years of service will receive 0.8% multiplied by the number of complete years elapsed between retirement and July 1, 1984.
17. Chapter 84-266, Laws of Florida—All retirees must be provided with the opportunity to rejoin the health insurance plan offered by their former employer. This amendment provides that the employer must notify not later than January 1, 1985, all retired former personnel or their eligible dependents, who shall have until April 1, 1985, to accept or reject, in writing, participation in the employer's group insurance or self-insurance plan.

#### ACTUARIAL VALUATION COMPLETE

The actuarial firm of Tillinghast, Nelson and Warren, Inc., of Atlanta, has recently completed the three year actuarial valuation of the Florida Retirement System (FRS). This review is required by law and is designed to



reveal the financial condition of the Florida Retirement System Trust Fund.

### *Complex Formula*

Simply put, an actuarial valuation is a set of complex calculations used to determine whether or not a retirement system has or will have sufficient funds to pay all retirement benefits promised. In making the calculations, actuaries usually identify separately the liability for the benefits already earned for retirees as of the valuation date (usually known as "actuarial accrued liability") and the liability for the future benefits that will be earned by employees (referred to as "normal cost"). The logic behind this valuation method is easy to understand. By identifying the cost of the current benefits and assuming that that cost will be met in the future through contributions designated for that purpose, the funding problem can be isolated to the unfunded liability for prior normal costs which were not paid, otherwise known as the unfunded actuarial accrued liability.

### *Unfunded Actuarial Accrued Liability (UAAL)*

Using factors such as return on investments, salary increases, payroll growth, terminations, disability, mortality, and others, the actuaries calculate the cost of benefits that will be earned from the date of the valuation into the future. This cost is usually expressed as a contribution rate or percentage of payroll for each member of the system and, as already mentioned, is referred to as the "normal cost." Then, using similar factors, the actuaries determine the cumulative cost for all past years and calculate the amount of money there should be in

the retirement fund as of the valuation date if sufficient contributions had been paid for all years in the past, including interest that would have accumulated. The difference in the calculated amount that should have been paid and the actual amount that is in the retirement fund is called the unfunded actuarial accrued liability (UAAL). A payment schedule expressed as a percentage of each member's salary is designed by the actuaries to amortize or pay-off this unfunded liability, over a period not to exceed 30 years, as provided by law.

Applying the basic techniques just outlined, the actuarial firm of Tillinghast, Nelson and Warren, Inc., performed an actuarial valuation of the FRS and found that the unfunded actuarial accrued liability of the FRS as of July 1, 1983, was \$6,503,123,000. Three years earlier, in 1980, this liability was \$4,323,005,000.

Most of the increase in the UAAL was expected and was caused by the following:

1. There was an expected increase due to the payroll growth method used to amortize the unfunded liability. This method, which was adopted by the Legislature in 1978, anticipates an increase in the UAAL for approximately 20 years and then a rapid decrease as the active payroll grows in size until the contributions are sufficient to not only cover each year's interest on the liability, but to begin amortizing the principal as well. (See further explanation in Section titled "Projection of UAAL.")
2. A very substantial experience loss occurred over the three-year period since the last actuarial review in 1980. This loss is mainly attributable to salary in-



creases for FRS members which were in excess of those assumed and to employee turnover which was much lower than assumed.

3. There were changes in the actuarial assumptions which resulted in a net increase in estimated actuarial liabilities, e.g., mortality experience was such that retirees were living longer than had been assumed.

Table 1 summarizes the assumed experience over the last three years with respect to certain economic factors.

#### *New Contribution Rates*

The end result of the actuarial valuation of the FRS is the development of contribution rates for each class of membership which are sufficient to pay the current and future retirement benefits earned by members and also to amortize the unfunded actuarial accrued liability in 30 years. The adequacy of these rates is dependent on several factors that were assumed in the course of the actuarial valuation, the three most critical being: 1) the assumption that the size of the membership payroll will grow by 7% per year; 2) the assumption that the long-term investment return of the retirement trust fund will equal 9% compounded annually; and 3) the assumption that salary increases will progress at 7.5% compounded annually. Table 2 shows the current and new rates of employer contributions as determined by the valuation.

TABLE 1

	1980 Assmptn	1983 Assmptn	1980-83 Actual Experience		
			80-81	81-82	82-83
Rate of Investment Return	8.50%	9.00%	9.60%	10.19%	9.68%
Individual Member Salary Increase Rate	8.00%	7.50%	11.60%	11.40%	9.70%
Total Payroll Growth Rate	6.75%	7.00%	12.20%	11.80%	11.30%

*All rates are average compound annual rates.  
Investment returns exclude realized and unrealized gains and losses.*

TABLE 2

#### *Contribution Rates by Membership Class*

Membership Class	Contribution Rates on Gross Salary	
	Current Rate	New Rate*
Regular	10.93%	11.99%
Special Risk	13.95%	14.42%
Special Risk Administrative Support	11.14%	12.84%
Judicial	22.55%	21.54%
Legislative/Attorneys/Cabinet	19.30%/20.95%/21.03%	10.73%
County Elected	19.30%	16.72%

*\*The new rates will be effective October 1, 1984. The 1984 Legislature adopted rates .25% greater than those proposed above to guard against unexpected increases in the UAAL.*

#### *Projection of UAAL*

The UAAL is an interest-bearing obligation, similar to a mortgage. The UAAL represents a sum of money which, if actually deposited in the retirement trust fund and earning interest at the assumed rate, would, along with current assets and future normal cost contributions, be

exactly sufficient to pay all future benefits for current members (if all assumptions are realized). If the UAAL were an asset of the trust fund, it presumably would be earning interest at the assumed 9% rate; since, however, it is a debt, it must be treated like a mortgage—by the payment of accrued interest.

Table 3 shows the projected growth of the UAAL.\*

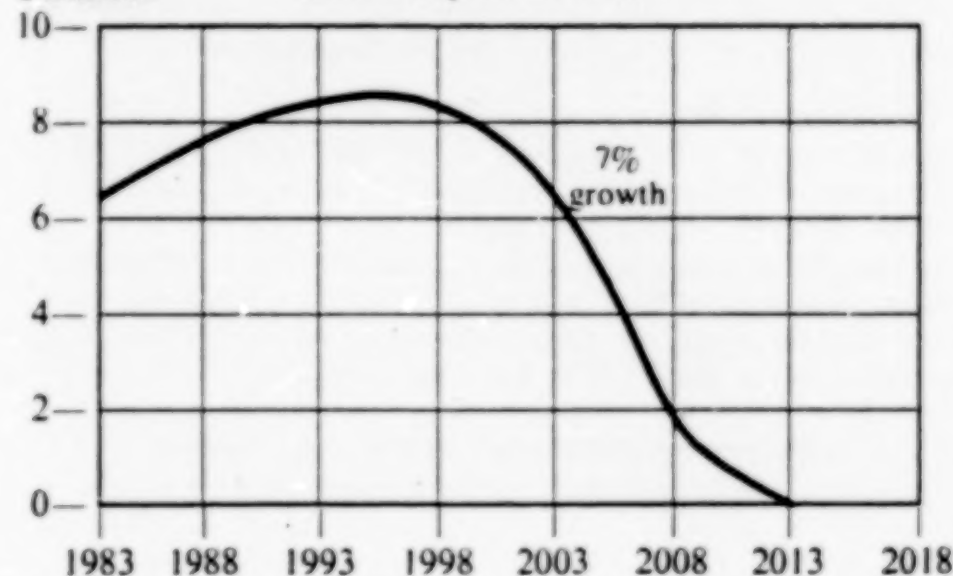
The following observations may be made from the table:

1. The UAAL grows for a number of years during which the payroll contributions are insufficient to meet each year's 9% interest requirement, thereby causing it to increase by the amount of the unpaid interest. If the actuarial assumptions are realized, the UAAL will reach its maximum in 1995, at which time the current UAAL of \$6.50 billion will have increased to \$8.66 billion.
2. After 20 years, the UAAL is approximately equal to the amount on July 1, 1983. This means, in effect, that only accrued interest has been paid during those 20 years and that the discharge of the entire principal amount occurs over the last 10 years—by which time the payroll is assumed to have grown to such proportions that the application of the contribution percentages produces rapid funding of the principal. Amortization of the entire principal is to be accomplished by the year 2013.

\* Table 3 appears here in the text and is reproduced in its entirety on the following page.

TABLE 3

**Unfunded Actuarial Accrued Liability**  
Amortization Pattern as Function of Annual Compound  
Rate of Payroll Growth



### Conclusion

The Florida Legislature has made provisions for funding the FRS in recent years by increasing employer contributions to meet funding needs and to guarantee benefits to current and future retirees. In 1985 another actuarial review will be conducted to check the financial condition of the Florida Retirement System to determine if any further action is needed by the Legislature.

The *Florida Retirement Systems Bulletin* is an official publication of DEPARTMENT OF ADMINISTRATION, Division of Retirement. Prepared by: Jenny Bryant, Mary Beth Brewer, Mickey Campbell and Ron Poppell; the Research, Education & Policy Section. This publication was promulgated at a cost of \$27,871.95 or \$.064 per copy for 430,000 copies to inform members of the policies and operations of the Florida Retirement System.

---

### PLAINTIFFS' EXHIBIT 18

#### TILLINGHAST

TILLINGHAST, NELSON & WARREN, INC.

Consultants • Actuaries

United States	United Kingdom	Canada
Bermuda	Ireland	

IBM Building, Suite 130  
815 South Main Street  
Jacksonville, Florida 32207  
(904) 398-5661

May 3, 1984

The Honorable Nevin G. Smith  
Secretary of Administration  
State of Florida  
435 Carlton Building  
Tallahassee, Florida 32301

Re: Performance Audit Report of the  
1983 Actuarial Valuation of the  
Florida Retirement System: Tillinghast Response

Dear Secretary Smith:

Tillinghast, Nelson & Warren ("Tillinghast") has been requested to respond to the Performance Audit Report ("PAR"), dated April 17, 1984, issued by the State of Florida Office of the Auditor General with respect to the 1983 actuarial valuation of the Florida Retirement System. This letter report will address the issues raised in the PAR, including the general audit conclusions and specific findings and recommendations. (Paragraph references are to the PAR.)

#### Summary Response

The PAR is well structured and calls attention to several aspects of the Tillinghast study which are important to the financial well-being of the FRS. Specifically treated



are the actuarial assumptions used in the estimation of FRS liabilities and the funding policy through which these estimated liabilities are expected to be discharged.

There exist a number of techniques and concepts which are unique to the actuarial profession, the misunderstanding of which may easily cause the user of actuarial reports to reach invalid conclusions regarding the financial condition of a retirement system. Unfortunately, the *value of the PAR is diminished by the failure to interpret correctly certain fundamental conclusions reached by Tillinghast*; e.g., see first general audit conclusion (paragraph 23) below. (This statement is not intended to apply to the supporting report issued to the Office of the Auditor General by its consulting actuaries. This latter report contains a number of conclusions and recommendations with which Tillinghast may or may not agree, but with respect to actuarial principles and practices, it is soundly conceived.)

*Specific Issues (references are to paragraph numbers in the PAR)*

Paragraph 23: *Relationship of Earned Benefits to Assets.*

The PAR states: "The current actuarial valuation reported that the Florida Retirement System's unfunded accrued liability, the value of earned pension benefits not covered by plan assets, increased from \$4.3 billion in 1980 to approximately \$6.4 billion in 1983." This is a very unfortunate statement for two reasons: First, it sets a very negative tone for the remainder of the PAR, and suggests to the cursory reader that the FRS is in serious financial

difficulty. Second, the statement is *absolutely false*—and is a prime example of invalid conclusions reached through mistaken interpretation of actuarial information.

In point of fact, members' "earned pension benefits" are well funded; specifically, members' vested accrued benefits are *more than 100% funded* by current plan assets. The \$6.4 billion of unfunded accrued liability has literally nothing to do with the current funded status of accrued benefits.

It is inappropriate to reiterate here technical explanations set forth in detail in the Tillinghast, Nelson & Warren report (4/2/84) covering the Actuarial Review of the Florida Retirement System as of July 1, 1983 ("Tillinghast Report"). Suffice it to say that the \$6.4 billion unfunded actuarial accrued liability revealed in the report is an outgrowth of the actuarial cost method employed for funding the FRS. As such, it represents the excess of (a) the portion allocated to fiscal years before 1983 of overall projected benefit liabilities, reflecting both past and future service and estimates of future salaries, over (b) current assets. Again, this "deficiency" is not directly connected with the value of currently earned benefits.

It is very important to dispel this mistaken notion if one is to place the remainder of the PAR's findings and recommendations in proper perspective.

Paragraph 24: *Liabilities and Contribution Rates May Have Been Understated.*

The 1983 actuarial valuation of the FRS was performed in full accordance with generally accepted actuarial principles and practices. The report of the Auditor General's consulting actuaries (see Exhibit 2 of the PAR) will con-

firm this. The actuarial assumptions were designed with due deliberation in an effort to arrive at a best estimate of the long-term liabilities under the FRS and to develop contribution rates consistent therewith. Further elaboration on these points is made throughout the remainder of this letter report. See especially the responses below to paragraphs 54 and 90.

**Paragraph 25: *Key Economic Assumptions are Inadequately Explained.***

*There is a lack of statutory authority for the amortization policy.*

*Certain liability factors were not addressed.*

An explanation of the selection of the key economic assumptions is contained in Appendix B (pages B-1 through B-4) of the Tillinghast Report. It was indicated that the economic assumptions were based on an underlying inflation rate plus recognition of real rates of return, merit and seniority increases, and member growth (depending on the assumption addressed). It is unclear why this explanation is considered "inadequate."

The procedures are consistent with the statutory authority presently in existence with regard to amortization of "unfunded accrued liabilities." Perhaps the PAR is calling for review, clarification and possible expansion of present statutory authority.

With respect to factors not addressed, it is assumed that the PAR is referencing the issue of unused annual leave. Commentary on this issue appears below under paragraph 98.

**Paragraphs 37-39: *Continual Efforts Should be Made to Improve the Quality of Actuarial Valuation Data.***

The FRS database has been profoundly improved with respect to both accuracy and completeness over the last decade. Nevertheless, the Division continually strives to enhance the quality of the database, and in this regard, Tillinghast supports and encourages continuation of this effort.

**Paragraphs 40-54: *Assumptions Should Reflect Consistent Methods, Criteria, and Underlying Bases and Should Take Account of Recent Experience; Effect of Changes in Assumptions Should be Revealed, and Gain and Loss Analysis Should be Provided.***

With respect to the interest rate assumption of 9%, it should be noted that the equity portion of the trust fund has increased dramatically in recent years, which should enhance the total rate of return. It should be noted that the investment return rates shown in Table IV-2 *exclude* realized capital gains and losses, which are expected to be a primary component of the overall rate of return on equity securities. When realistic values are assigned to the "building blocks" consisting of inflation, real rate of return, and expected reward from professional management, the 9% rate is deemed to be justified. (Surveys comparing the 9% FRS rate to other rates currently in use for state systems would probably not reveal the steady trend over the last several years to higher assumed rates of return.) With respect to the salary increase history shown in the same table, it should be observed that certain salary in-



creases (e.g., catch-up increases for teachers) have been "special", and such increases should not be allowed to influence long-term salary projections.

The assertion is made that the increase in the "spread" between the salary scale and interest rate has resulted in a less conservative estimation of liabilities and therefore an optimistic level for required contribution rates. We would substitute "more realistic," for "less conservative"; assumptions which are logically constructed should be used regardless of whether they operate to increase or decrease costs. To impose an arbitrary margin of conservatism may needlessly penalize current taxpayers. Further, the significance of the "spread" may be very misleading. The "spread" in and of itself is not a sufficient indicator of conservatism or optimism. In some cases an interest rate/salary scale spread of three percentage points can be *more* "conservative" (increased estimated liabilities) than another interest rate/salary scale spread combination with a one percentage point spread! Note that if all other assumptions are *held constant* and the "spread" is increased, the estimated liabilities do in fact decrease. The point is, however, that *all* of the assumptions are reviewed prior to each valuation, and generally all are changed together. The total package is deemed to be the best current estimate of future experience under the FRS—and the "spread" is no more than an observable difference between two elements in the best-estimate package.

With respect to overall methodology, to assume that consistent methods, criteria, etc. have *not* been used, is tantamount to suggesting that the assumptions have been selected arbitrarily and capriciously. On the contrary, the demographic assumptions reflect detailed experience

studies, and the economic assumptions were developed with the assistance of various sources of economic expertise in State government. The procedures underlying these assumptions and the rationale for selection of assumptions was set forth in considerable detail by letter report prior to the performance of the actuarial valuation.

With respect to allegedly missing information, it should be pointed out that the change in the unfunded actuarial accrued liability due to change in actuarial assumptions, as well as the amount of the 1980-1983 net experience loss, are clearly set forth in Table IV-B on page 4-7 of the Tillinghast Report—along with specific changes in required contribution rates arising from these changes in the UAAL. Analysis of experience gains and losses by broad categories would be of interest to observers of the FRS, and Tillinghast will consult with the Division of Retirement with respect to gain and loss parameters for the next valuation. It should be emphasized, however, that a breakdown of the total gain or loss into components will *not in any way affect* the estimated liabilities and contributions requirement resulting from the valuation.

Paragraphs 57-62: *The Impact of Using a "Dedicated Portfolio" Approach to the Valuation of Retirees' Benefits Should be Disclosed.*

The PAR implies that the cash-flow matching of projected benefits with the yield from fixed-income securities is unsound because the so-called "dedicated" securities are subject to trade. This objection is clearly without foundation, since the non-frozen nature of the "dedicated" segments should, if anything, operate to *enhance* actual rate



of return; i.e., if trades are made involving "dedicated" securities, the total rate of return would be expected to improve. Put more simply, to mothball the earmarked securities would constitute the ignoring of any opportunity to improve the rate of return on that segment of the trust fund—an action hardly consistent with prudent investing.

With respect to the impact of the cash-flow matching technique, the State Retirement Actuary has measured the retired life liability on the basis of the active life interest assumption. This information was made available to Tillinghast and was used internally in the valuation process in the course of various tests for reasonableness of results. Although many items of supplementary interest are revealed in the course of an actuarial review, it is neither feasible nor desirable to attempt to include all possibly relevant items in a valuation report. Further detail with respect to the cash-flow matching technique was not considered to be particularly germane in the sense of being included in the Tillinghast Report.

As a general observation, the attempt to isolate the impact of any particular change in an actuarial assumption or technique can be more misleading than helpful. For example, if all other assumptions are held constant, the effect of, say, a 1% change in the salary scale can be measured. Similarly, the effect of a 1% change in the assumed interest rate may be measured. But the whole is not equal to the sum of the parts: If *both* the salary scale and interest rate are changed by the same 1%, the resulting combined change in actuarial liabilities will *not* be equal to the sum of the two independent results. An actuarial report is intended to present financial results to users who are typically non-actuaries; as such, the major

purposes of the report must be emphasized—sometime at the expense of excluding certain information which might be relevant to some but would also serve to confuse others.

If the Auditor General desires a description of the size and composition of the bond portfolio required to generate the necessary cash flow to support retirees' benefits, this would be most appropriately obtained from the State Board of Administration which constructs the earmarked segment based on cash-flow requirements furnished by the State Retirement Actuary. The SBA would also be the most logical source of information regarding trading limitations on the assets and any other relevant features.

**Paragraph 63: *The Division of Retirement and the State Board of Administration Should Determine Steps to Take if "Dedicated" Investments Fail to to Produce the Necessary Cash Flow to Meet Retirees' Benefits.***

The earmarked (as opposed to "dedicated") segment of the portfolio will be reviewed and adjusted as necessary during the course of each actuarial valuation—and perhaps more frequently. Each time this review is performed, a greater or lesser segment of the total bond portfolio will be assigned to match the selected retired life cash flow—leaving a greater or lesser portions of the portfolio to apply against the liabilities for active employees. The result of this shifting will be revealed as an experience gain or loss in each formal actuarial valuation.

Certain observations in the PAR seem to suggest that the cash-flow matching technique in some fashion results in a highly rigid structure for the payment of retirees' bene-

fits. This is most emphatically *not* the case. The procedure is merely a valuation technique used to place a reasonable estimate on the true retired-life liabilities. When the process has been completed, it may be demonstrated that the future stream of expected benefit payments is matched by the income stream from the earmarked securities. If subsequent investment strategy indicates that these earmarked securities should be replaced by other securities (fixed income or otherwise) offering a more attractive total rate of return, then the FRS is strengthened—with absolutely no adverse effect upon the security of retirees' benefits.

Paragraphs 64-70: *An Asset Valuation Method Should Have Been Used in the July 1, 1983 Actuarial Valuation; It is Recommended That an Acceptable Method be Selected and the Valuation Results Revised to Identify Material Contribution Increases.*

It is agreed that a technique should be adopted to mitigate peaks and valleys in the market value of equity securities. Due to the recent liberalizations in the Florida laws governing the portion of public pension funds which may be invested in equity securities, Tillinghast has recommended that a smoothing technique for equities be employed in arriving at an appropriate measure of assets for actuarial valuation purposes.

Tillinghast did not employ a smoothing technique in the July 1, 1983 valuation, preferring to adopt the procedure on a prospective basis in recognition of the fact that the bulk of the equity securities in the FRS trust fund have

been added to the portfolio over only the last year or two before July 1, 1983.

It should be realized that spreading techniques are already in use to protect against undesirable variations in contribution rates resulting from fluctuations in the market value of securities. First, bonds are carried at amortized book value, thus insulating the actuarial value of bonds from variations in market interest rates. Second, unexpected changes in the value of assets have a direct impact on the experience gain or loss revealed in the actuarial valuation—but such gains or losses are amortized over a number of years (currently 30) in the future such that only as small fraction of the gain or loss affects current contribution requirements.

For the sake of completeness, it should be noted that the example shown in Exhibit 1 of the PAR of the calculation of an average asset value *does not conform* to the example in the ERISA regulations cited in the PAR (CFR 1.412(c)(2)). The reason is that bonds carried at amortized value are specifically excluded from such averaging—whereas the Exhibit 1 example operates on the entire trust fund including bonds carried at amortized value which represent approximately 54% of the total trust fund.

Tillinghast expects to work with the Division of Retirement and the State Board of Administration in developing the specifics of an asset valuation method which is internally consistent, which conforms to ERISA guidelines to the extent desired, and which accomplishes intended objectives.



**Paragraphs 71-76: *Experience Gains and Losses Should Be Amortized Over Less Than 30 Years (15 Years Recommended).***

The 1980 and 1983 actuarial valuations utilized an amortization period of 30 years for experience gains and losses. Thirty years was the period established by the Legislature for the amortization of the FRS' UAAL determined as of July 1, 1977. Thirty years is also the amortization period prescribed by Florida law for the funding of increases in the UAAL due to plan amendments. There exists no statutory provision for requiring funding of any element of the UAAL over a period of less than 30 years (although a 40-year period is prescribed in Chapter 112.64(4) in connection with new systems coming into existence after October 1, 1980).

Tillinghast would have no objection, however, to the adoption of a 15-year period (or any other period) for the amortization of experience gains and losses, and it is noted that 15 years is the associated amortization period for pension plans covered by ERISA. It may be observed, however, that the continued use of a 30-year amortization period will make full provision for the discharge of experience gains and losses in an orderly fashion and is not inconsistent with the funding principles embodied in current law.

**Paragraphs 77-79: *Liabilities Attributable to the 1981 Supplementary Cost-of-Living Increases to Retirees Should be Amortized Over a Period Not Greater Than 15 Years.***

The supplementary cost-of-living increases clearly constitute an amendment to the FRS, and as such, the statutory

prescription of 30-year amortization clearly applies. The PAR recommendation is obviously one of preference, and because it conflicts with current law, would require enabling legislation.

Tillinghast has no objection to the adoption of a 15-year amortization period for liabilities created solely on behalf of retired members. It should be noted, however, that there is often an emotive, rather than logical, basis underlying a call for accelerated funding of retirees' increases. This is understandable insofar as it emanates from the observation that regular funding (i.e., over 30 years) will carry well beyond the average life expectancy of the members enjoying the benefit improvement. However, from an actuarial viewpoint, no segment of the total UAAL is distinguishable from any other segment, and the funding policy should not (and does not under current law) attempt to make distinctions where none in fact exist.

**Paragraphs 81-90: *The Current Amortization Policy is Overly Optimistic and May Result in Unacceptable Liability Increases. Annual Payroll Contribution Rates Should Be Increased by 1%.***

It is very important to view the UAAL not merely as an absolute dollar amount—but primarily as a quantity the magnitude of which can best be expressed in relation to other obligations of the State.

According to one school of thought, pensions are a form of deferred compensation, and hence should be considered as a payroll-related obligation. If one accepts this point of view and also realizes that pension obligations are funded as a direct percentage of payroll, it then becomes meaning-



ful to study the current and projected magnitude of the UAAL as it relates to current and projected annual payroll under the FRS.

The projections included in the Tillinghast Report indicate that despite the increasing dollar magnitude of the UAAL, the ratio of the UAAL to the FRS annual payroll is expected to decline from 108% in 1983 to 64% in 1995 (the year in which the projected UAAL is expected to reach its maximum value). This ratio of UAAL to annual payroll then rapidly decreases to zero.

The funding policy for the eventual amortization of the UAAL was carefully conceived prior to the 1977 actuarial review; it was then codified in Florida law and has been strictly adhered to since that time. The policy was designed with the financial condition of the FRS as the primary consideration; however, a critical secondary consideration was the equitable apportionment of pension costs over current and future generations of taxpayers. The alternative UAAL funding proposals illustrated in Tables IV-4 and 5 of the PAR would undoubtedly enhance the financial condition of FRS—but would do so by means of a pronounced *increase in the funding burden placed upon current taxpayers*, with a corresponding decrease in the funding responsibilities to be borne by future taxpayers. A deliberate reallocation of financial responsibilities favoring future taxpayers at the expense of current taxpayers is a matter of State policy and is beyond the purview of Tillinghast's assignment.

Paragraphs 92-98: *Pension Increases Attributable to Inclusion of Unused Annual Leave in the Determination of Average Final Compensation Were Not Recognized in the 1983 Actuarial Valuation. The Impact of This Practice Should Be Studied and Included in the Next Actuarial Valuation.*

It is true that data was not available to allow specific provision for unused annual leave in the 1983 actuarial valuation. Tillinghast was aware, however, of this factor, as well as other similar factors, none of which, standing alone, was considered for separate analysis, but collectively, should not have been ignored in the actuarial valuation. Hence, an overall adjustment to projected pension benefits was made in recognition of these factors.

It is agreed that the matter of unused annual leave should be reviewed prior to the next actuarial valuation, and an experience study could be performed within the Division of Retirement to provide a more specific basis for recognition in the actuarial valuation.

It may be observed that a fundamental concept underlying the design of the FRS is that pensions are to be directly and reasonably related to members' compensation.

It is difficult to reconcile this philosophy with a procedure that distorts Average Final Compensation by the tack-on of an amount unrelated to regular base compensation. It is understood that this policy is currently under review in the State Legislature.

Paragraphs 99-103: *Solvency Tests and Trends are Inadequately Covered in the Tillinghast Report and Should Be Included in Future Reports.*

It is agreed that information should be provided in actuarial valuation reports to enable the users of these reports to draw meaningful conclusions regarding the financial condition of the retirement system under study.

Although Tillinghast strives to enhance the communication value of its reports, it is acknowledged that improvements can always be made, and this will be pursued.

It is *not* agreed, however, that the Tillinghast Report displays a major deficiency through a lack of information regarding the financial condition of the FRS.

Attention is called to the following sections of the Tillinghast Report which provide information on the current and future financial condition of the FRS:

- Projections from 1983 through 2003 (with intermediate values) of the UAAL segments by amortization periods (24, 27 and 30 years) are shown in Table 4-C on page 4-9 of the Tillinghast Report.
- Graphical presentations of projected values of the UAAL under alternative assumptions with respect to payroll growth are shown in Table 4-D on page 4-11 of the Tillinghast Report.
- Projections from 1983 to 2033 (with intermediate values) of the annual FRS membership payroll as a function of varying annual payroll growth rates is set forth on page 4-10 of the Tillinghast Report. This information enables the user of the Tillinghast Report to examine the UAAL:

Payroll ratios discussed above under the response to Paragraphs 81-90 of the PAR.

- Information regarding the current funded status of the FRS, showing estimated liabilities for both vested and non-vested accrued benefits earned through July 1, 1983, along with current asset information, was not directly included in the Tillinghast Report; however, a schedule showing this information was distributed (and intended to be viewed as an addendum to the Tillinghast Report) at the April 26, 1983 Joint Committee Meeting of the House Appropriations Committee and House Retirement, Personnel, and Collective Bargaining Committee, at which the Tillinghast Report was presented.

Tillinghast will be pleased to provide additional information regarding current solvency and trends in future reports, and will consult with the Division of Retirement to determine specifications.

Paragraphs 104-105: *The Frequency of Actuarial Valuations of the FRS Should Be Increased From Triennial to Biennial.*

The FRS is an extremely complex system under which benefit liabilities are continually impacted and changed by a variety of economic and demographic factors. Experience has shown that substantial fluctuations in liabilities (and associated contribution requirements) may occur between triennial valuations, which may result in relatively abrupt fluctuations in contribution requirements. A more stable pattern of contribution requirements would undoubtedly result from more frequent actuarial valuations.

In the private pension sector, annual valuations are the general rule—due to the desire of corporate management

to avoid sudden changes in the substantial cost of pensions. It is recommended that the State Legislature take this biennial actuarial valuation proposal under consideration and weigh its advantages against the significant cost and time expenditure attached to the actuarial valuation process.

Members of the Tillinghast staff will welcome the opportunity to meet with representatives of the Department of Administration, Division of Retirement, Office of the Auditor General, and the Legislature to discuss this letter report or any other aspect of the 1983 actuarial valuation or related matters.

Very truly yours,

TILLINGHAST, NELSON & WARREN, INC.

By: /s/ Michael J. Tierney

Michael J. Tierney  
Associate of the Society of Actuaries  
Enrolled Actuary Number 1337

By: /s/ F. Bard Brutzman

F. Bard Brutzman  
Fellow of the Society of Actuaries  
Enrolled Actuary Number 717

---

PLAINTIFFS' EXHIBIT 19

Tillinghast

Tillinghast, Nelson & Warren, Inc.  
Consultants • Actuaries

United States - United Kingdom  
Canada - Bermuda

Tower Place  
3340 Peachtree Road  
Atlanta, Georgia 30026  
(404) 261-5420

February 8, 1983

Mr. A. J. McMullian III  
State Retirement Director  
Department of Administration  
State of Florida  
530 Carlton Building  
Tallahassee, Florida 32304

Dear Andy:

Here is draft number two of our certification for the annual report. You will see that it is essentially the same as your mark-up of my original. I'm sure this one will be close, and if minor changes are needed, perhaps we can simply discuss it over the telephone.

I did not use the Wyatt letter, as it was primarily a description of their assumptions. I must admit, however, that I was a little amused by the Wyatt usage (twice) of the term "actuarially sound". That term, as you know, is without definition and therefore very convenient for many purposes—sort of like "good" or "bad".

I suspect that the late Dorrance Bronson, a founder of The Wyatt Company and one of the outstanding statesmen of our profession, would have been a bit uncomfortable with the Texas pronouncement. The enclosed excerpt from Bronson's monograph, "Concepts of Actuarial Soundness in Pension Plant," will give you an idea why.



Best regards.

Sincerely,

/s/ Bard  
F. Bard Brutzman

FBB:mg  
Enclosures

cc: Mr. L. J. Gibney  
Mr. W. A. Ferguson  
Mr. M. J. Tierney

Tillinghast                      Tillinghast, Nelson & Warren, Inc.  
Consultants • Actuaries

United States - United Kingdom    IBM Building, Suite 130  
Canada - Bermuda                      815 South Main Street  
Jacksonville, Florida 32207

February 8, 1983                      (904) 398-5661  
Members of the Florida Legislature

and

Members of the Florida Retirement System

*Statement Regarding Actuarial Valuation  
as of July 1, 1980*

State law requires that actuarial valuations of all public retirement systems be performed at least every three years. The last actuarial valuation of the Florida Retirement System (FRS) was conducted as of July 1, 1980, and the next valuation is scheduled for July 1, 1983.

The contribution rates resulting from the 1980 valuation were computed to be sufficient to cover normal costs; to amortize the remainder of the Unfunded Actuarial Accrued Liability (UAAL) determined in 1977 over a 30-year period from July 1, 1977; and to amortize the in-

crease in the UAAL which resulted due to the change in actuarial assumptions and the actual experience of the FRS from July 1, 1977 through June 30, 1980, over the 30-year period beginning July 1, 1980.

In performing the valuation, we relied without audit upon the financial statements and membership data furnished us by the Division of Retirement. Although the membership data was subject to standard editing procedures and the other information was reviewed for reasonableness, Tillinghast does not assume responsibility for either its accuracy or completeness.

The non-economic assumptions were derived in part from FRS experience and in part from standard actuarial sources. The development of the economic assumptions was based partially on information and forecasts furnished by the Department of Administration and the State Board of Administration. In our opinion, the assumptions used in the valuation are reasonably related to the past experience of the system and reflect carefully conceived forecasts of future conditions affecting the FRS. It should be noted, however, that future developments may cause significant change, for better or worse, in the actuarial condition of a system as estimated at a particular point in time. Periodic reappraisal of past and projected experience, along with frequent actuarial valuations, are essential to well informed decisions affecting the financial balance of the FRS.

We hereby certify that our valuation report is complete and accurate to the best of our knowledge. The report was prepared in accordance with generally recognized and accepted actuarial principles and practices which are con-

sistent with the applicable Guides to Professional Conduct, amplifying Opinions, and supporting Recommendations of the American Academy of Actuaries.

Respectfully submitted,

TILLINGHAST, NELSON & WARREN, INC.

By: /s/ F. Bard Brutzman	By: /s/ Michael Tierney
F. Bard Brutzman	Michael J. Tierney
Fellow of the Society of Actuaries	Associate of the Society of Actuaries
Member, American Academy of Actuaries	Member, American Academy of Actuaries

#### ACTUARIAL BACKGROUND OF PENSION PLANS

thing? I do not know. Or item 6: When is a plan not self-supporting? Is it only when the fund or employer runs dry of money? Or item 4: how, "fully funded"? Forevermore, or just for this year? [Sic—exactly as appears in exhibit attachment.]

The important thing I am trying to bring out is the lack of a clear language in the pension field, both in respect of those of the field (including, except for algebraic expressions, the actuary) and those outside of it. The latter are the worst offenders but perhaps we in the field are to blame for our looseness of terms. In the next chapter some specific quotations will be given further exemplifying this terminological haze.

#### *Purpose of This Monograph*

Not in the whole of actuarial or other pension literature is there a unified treatment of the subject herein at-

tempted.<sup>6</sup> What is this subject? The title is *Concepts of Actuarial Soundness in Pension Plans*, and as implied in the previous section, actuarial soundness means different things to different people. I shall try to examine different aspects of the amorphous concept, "actuarial soundness," which is the term used hereinafter for representing the heart of the matter we are endeavoring to identify, classify and place neatly on the shelf. If those items, ideas, methods, and attributes that definitely do not pertain to "actuarial soundness" are culled out, possibly what is left will reveal, to a degree, what it is we seek.

---

<sup>6</sup>The closest approach to such a treatment is found in the *Proceedings of Panel Meetings*, "What Is Actuarial Soundness in a Pension Plan," sponsored by the American Statistical Association (and other groups), Chicago, December 29, 1952. The author participated in this panel, and he has drawn freely on both his own discussion and that of the other panel members in preparing this monograph.

#### THE WYATT COMPANY

Actuaries and Consultants

Pension Plans Employee Benefits Compensation  
Programs International Benefits Employee  
Communications Management

1900 Republic National Bank Tower  
Dallas, Texas 75201  
(214) 748-5867

March 12, 1982

Atlanta Boston Chicago Cleveland Dallas-Fort Worth  
Detroit Grand Rapids Honolulu Houston Los Angeles  
Memphis Miami Minneapolis-St. Paul New York  
Orlando Philadelphia Phoenix Portland San Diego  
San Francisco Seattle Stamford Washington  
Calgary Halifax Montreal Ottawa Toronto Vancouver



## BOARD OF TRUSTEES

### Teacher Retirement System of Texas

#### *Summary of Actuarial Report Requested by State Auditor*

The State Auditor's office has requested that we summarize the results of the actuarial valuation of the Teacher Retirement System of Texas as of August 31, 1981. The actuarial valuation report reveals that the Teacher Retirement System of Texas is an actuarially sound system and the present assets (in excess of \$6.3 billion) plus the contributions required by the law in the future will be sufficient to meet the payments to the present active and retired members and their beneficiaries and to future participants in the System.

The actuarial assumptions upon which these findings are based are as follows:

1. Mortality for retired members based on the 1971 Group Annuity Mortality Table with differing age setbacks for males and females. An extensive study of actual mortality experience of retired members under the System indicated that this mortality table is appropriate and contains a degree of conservatism.
2. Mortality for active members based on a table constructed from the actual experience of the Teacher Retirement System of Texas.
3. Disability, retirement and withdrawal rates based on actual experience of the Teacher Retirement System of Texas.
4. An interest rate of  $7\frac{1}{4}\%$ , compounded annually, with regard to computations for retired persons and for active members. An interest rate of 8.45%, compounded annually, was used with regard to the 1975 Legislative increase for retired members; a

rate of 8.86%, compounded annually, was used with regard to the 1977 Legislative increase; a rate of 10.10%, compounded annually, was used with regard to the 1979 Legislative increase; and a rate of 13.66%, compounded annually, was used with regard to that portion of the two 1981 Legislative increases which were not funded by reserves released from the Retired Reserve Account.

5. Salary scale for projecting future salaries: a study of actual experience in the Teacher Retirement System of Texas was used as the basis for construction of salary scale tables which appear to be reasonable.
6. Excess of future State contributions required by law over the amount of such contributions required to fund the normal cost of benefits provided by the System. Basing the normal cost for the System on a study of all new entrants hired in the period from 1975 through 1980, the normal cost for all such new members will be 10.22% of payroll (6.65% by members plus 3.57% by the State) which is 4.93% of payroll less than the total contributions being paid by the members and by the State. It is assumed that the excess amount of 4.93% of payroll contributed by the State will be utilized to the fund the actuarial balance sheet deficiency shown on the actuarial balance sheet over a period of 17 years in the future, assuming that payroll grows at an aggregate compound rate of 5% per year.

Based on the above assumptions and the actuarial results shown in the report, it is our opinion that the Teacher Retirement System of Texas is actuarially sound and if the payroll in the future increases at the rate of 5%, compounded annually, the actuarial balance sheet defici-



ency will be amortized over a period of 17 years in the future.

Respectfully submitted,

THE WYATT COMPANY

/s/ W. Michael Carter  
W. Michael Carter  
Actuary

/s/ V. Clark Beaird  
V. Clark Beaird  
Vice President

---

PLAINTIFFS' EXHIBIT 20

STATE OF FLORIDA  
DEPARTMENT OF ADMINISTRATION

Division of Retirement

Mailing Address  
530 Carlton Building  
Tallahassee, Florida 32304

Location  
Cedars Executive Center  
2639 North Monroe Street  
Tallahassee, Florida

(SEAL)

Reuben O'D. Askew  
Governor

Robert L. Kennedy, Jr. Lt. Gov. J. H. "Jim" Williams  
State Retirement Director Secretary of Administration  
November 16, 1976

MEMORANDUM

TO: Mr. Robert L. Kennedy, Jr.  
State Retirement Director

FROM: L. J. Gibney /s/ LJG  
State Retirement Actuary

SUBJECT: 1977 Valuation—Mortality

The purpose of this memorandum is to bring you up-to-date as to what is happening in the industry with regard to the appropriateness of a mortality assumption to be employed in the valuation process.

It has only been very recently that there has been sufficient data available to justify mortality tables as a general valuation tool based primarily on the mortality experience under non-insured plans. The valuation table

we are currently using, 1971 Group Annuity Table, may not be appropriate for the valuation of non-insured pension plans. The 1971 Group Annuity Mortality Table was intended for use as a general valuation standard, and this raises the question as to whether this table or some modification of it should be used for valuing non-insured plans or whether a separate table appropriate for the non-insured pension plans should be developed.

One valid reason for using the 1971 Group Annuity Mortality Table as a valuation basis for non-insured plans has been that the variations in the mortality rates are relatively less important than the experience variations of other factors such as the rate of interest, rate of future salary increases, incidence of disability retirement, rate of withdrawal, average age at date of retirement, etc. Under the 1974 Pension Reform Act, the actuary is required to employ his best estimate and the use of a particular table because any variations that are too insignificant may not be considered as a valid reason.

Because of the general thrust taken by the Equal Employment Opportunity Commission, there is now a very strong possibility that actuaries will no longer be permitted to use mortality standards which provide for the use of a differentiation in rate of mortality by sex.

The use of mortality rates on a single "unisex" basis has been found quite practical for non-insured plans which have been shifting over to the use of approximate benefit factors anyway and thus getting away from the type of precise actuarial equivalence for early retirement and optional benefits.

Federal government pressure for treating males and females in exactly the same manner recalls to mind the fact that the government took a similar position in the '60's with respect to race and imposed a requirement that insurance companies charge exactly the same premium irrespective of race, in spite of the fact that there is difference in mortality between the races.

#### *Basic Data:*

For the pensioner mortality experience underlying the new table, the mortality experience includes 130,141 deaths of which 118,942 deaths were at attained age 65 and over. This is 53% more deaths than used in 1971 GAM for males and 800% more deaths than used in 1951 Table for males. The number of pensioner deaths used as a basis for the new table assures sufficient statistical significance to warrant the use of the table as a pension valuation standard.

#### *Mortality Experience by Sex:*

All of the available statistics seem to point in the direction of females having a significantly better mortality experience than males. The factor of sex is important to the extent that a higher female content in a group can lead to more favorable mortality experience of the group and significantly higher pension costs.

#### *Future Mortality Improvement:*

The composite experience data underlying the new table was reduced 10% to reflect the fact that this would be the case 17 years hence if the trend of a 6% reduction over a 10-year period continued. Since the mid-year point was calendar year 1967, this brings into the table the fu-

ture mortality improvements that can be anticipated up to calendar year 1984.

*Comparison With Other Mortality Tables:*

Several different tables have been used in the past but the comparison which follows selects only those that are widely used.

*Comparative Male Mortality Rates Per 1,000*

Age	Ga-1951 Male	1971-GAM Male	UP-1984 Male
35	1.37	1.12	1.51
45	3.58	2.92	3.77
55	10.44	8.52	9.88
65	24.42	21.26	24.85
75	62.43	55.29	57.78

*Comparative Female Mortality Rates Per 1,000*

Age	Ga-1951 Female	1971-GAM Female	UP-1984 Female
35	.93	.65	1.14
45	1.99	1.40	2.33
55	4.65	3.26	6.20
65	13.60	9.56	15.51
75	44.31	32.39	37.67

As noted above, the mortality rates on the new table are significantly higher than our current valuation standard, for both male and female; and, consequently, annuity values would be lower which, in effect, would reduce our liability somewhat.

*Value of \$1 A Year Payable Monthly*

Age		Male	Female
55	1971 GAM, 3½%	\$14.98	\$17.33
	UP-1984, 3½%	14.59	16.35
65	1971 GAM	11.14	13.45
	UP-1984	10.89	12.75
75	1971 GAM	7.51	9.19
	UP-1984	7.36	9.09

*Unisex Factors and Equal Benefits:*

The use of age adjustments to develop separate sex-segregated mortality tables, while customary in the past, may not develop socially acceptable results which provide actuarially equivalent benefits for early retirement or survivorship options. Appended is a paragraph from "Decision No. 72-1919" of the Equal Employment Opportunity Commission dated June 6, 1972 dealing with this question.

The EEOC's concern is that when actuarial tables are sex-segregated this frequently results in the payment of different periodic pension benefits to males and females under the guise of "actuarial Equivalence". Any such difference in benefits paid would constitute a violation of the Civil Rights Act of 1964, and thus the Commission requires that the periodic pension benefits paid to male and female employees in equivalent circumstances must be equal in amount.

As to the early retirement reductions, we already use a composite figure, 5% per year reduction for each year short of normal retirement date and thus we are making no distinction between the sexes.

We are, however, making a distinction when the survivorship option is selected. The sex-segregated actuarial



tables charge a male employee electing survivorship rights on behalf of a female spouse considerably more than the charge required when a female employee elects on behalf of a male spouse.

The UP-1984 Table has been developed as a composite mortality table which is appropriate for the valuation of pension plans covering groups having a 10% to 30% female content. The table can be set backward or forward to reflect differing percentages of females content and thus be deemed an appropriate valuation standard.

Composite mortality tables employed with actuarial factors independent of sex are referred to as "Unisex Tables" or "Unisex Factors". Such tables have been employed in the actuarial valuations for some of the nation's largest employers and "Unisex Option Factors" have been developed on the basis of age setback to reflect the different sex content. The method has been found satisfactory in practice and the results are in full compliance with both the letter and the spirit of the 1964 Civil Rights Act.

*Conclusion:*

A change from one mortality basis to another is generally of lesser importance than a  $\frac{1}{4}\%$  change in the valuation interest rate. Also, the other assumptions are considerably more important than the mortality assumption.

I would not bring this to your attention if it were not for the pressure of the Federal government via the EEOC to have equal benefits without regard to sex. Since our option factors make this distinction, it would seem prudent to resolve our course of action before the 1977 valuation

is started. If we do nothing and continue the use of 1971 GAM Table, we will no doubt have to come up with new option tables based on a more realistic interest assumption. Is it possible a year or two later, pressure would build such that we would be forced to go to a Unisex Table? If this were the case, then we would have to go through the expense of generating unisex option factors to replace ones that are but a year or two old.

*Recommendation:*

In light of the strong possibility of the Federal government mandating the use of such tables, I would recommend we consider going to the new basis for option reduction factors and resolve this differential in the benefits between the sexes once and for all. I would also recommend that in the valuation process, we maintain the distinction between the sexes so that there would not be any dispute upon resultant costs.

As I noted earlier, use of a new table will have only a slight effect on the overall valuation process when one considers the greater impact of the other assumptions employed.

LJG:pl

NOTE: The memoranda is a summary of a paper entitled, "Non-Insured Pension Mortality", by William W. Fellers and Paul H. Jackson of the Wyatt Company. It was presented at the Joint Program Conference of Actuaries in Public Practice and the Society of Actuaries, May 22, 1975.

A paragraph from "Decision No. 72-1919" of the Equal Employment Opportunity Commission dated June 6, 1972.

"The pension plan, incorporated in the bargaining agreement, provided a smaller reduction of the pension benefits for females who retired early than males who retired early. This followed from the use of separate actuarial tables for males and females in computing the early retirement benefits. Since there was no conceivable non-discriminatory justification for the use of sex-segregated actuarial tables to determine the reduction of an employee's pension upon early retirement, the pension plan discriminated against its male employees with respect to terms and conditions of their employment within the meaning of the Civil Rights Act."

LJG:pl

11/19/76

---

# PLAINTIFFS' EXHIBIT 21

## STATE OF FLORIDA DEPARTMENT OF ADMINISTRATION

Division of Retirement

Mailing Address  
530 Carlton Building  
Tallahassee, Florida 32304

Location  
Cedars Executive Center  
2639 North Monroe Street  
Tallahassee, Florida

(SEAL)

Reuben O'D. Askew  
Governor

Robert L. Kennedy, Jr.      Wallace W. Henderson  
State Retirement Director      Secretary of Administration

May 19, 1978

### MEMORANDUM

TO: Mr. Robert L. Kennedy, Jr.  
State Retirement Director

FROM: Larry Gibney  
State Retirement Actuary

SUBJECT: Option Election

Attached is a study of the type of option selected at retirement for those individuals retiring during calendar year 1973 through 1977. This includes only members retiring from the Florida Retirement System (FRS, TRS, SCOERS, HP, JRS).

This analysis will serve as a guide as to developing a UNISEX table for option reduction factors. In light of

the recent Supreme Court decision, it is not a question of "if" but "when" we adopt such factors.

I would appreciate any comments you may have.

LJG:pl

cc: Mr. M.T. McNab

### RETIRED PAYROLL

#### Option Election—1973 to 1977

<u>Calendar Year of Retirement</u>	<u>Option 1</u>	<u>Option 2</u>	<u>Option 3</u>	<u>Option 4</u>	<u>Total</u>
1973 Male	\$ 932	\$ 522	\$ 447	\$ 227	\$ 2,128
Female	1,414	652	246	76	2,388
Total	\$ 2,346	\$1,174	\$ 693	\$ 303	\$ 4,516
	52%	26%	15%	7%	100%
1974 Male	\$ 766	\$ 458	\$ 398	\$ 158	\$ 1,780
Female	1,284	607	179	64	2,134
Total	\$ 2,050	\$1,065	\$ 577	\$ 222	\$ 3,914
	52%	27%	15%	6%	100%
1975 Male	\$ 862	\$ 418	\$ 454	\$ 173	\$ 1,907
Female	1,359	497	212	81	2,149
Total	\$ 2,221	\$ 915	\$ 666	\$ 254	\$ 4,056
	55%	23%	16%	6%	100%
1976 Male	\$ 1,051	\$ 441	\$ 486	\$ 145	\$ 2,123
Female	1,588	511	246	51	2,396
Total	\$ 2,639	\$ 952	\$ 732	\$ 196	\$ 4,519
	58%	21%	16%	5%	100%
1977 Male	\$ 1,112	\$ 447	\$ 478	\$ 138	\$ 2,175
Female	1,606	431	233	56	2,326
Total	\$ 2,718	\$ 878	\$ 711	\$ 194	\$ 4,501
	60%	20%	16%	4%	100%

1973- Male	\$ 4,723	\$2,286	\$ 2,263	\$ 841	\$10,113
1977	47%	23%	22%	8%	
Female	\$ 7,250	\$2,698	\$1,115	\$ 329	\$11,392
	64%	24%	10%	3%	
Total	\$11,973	\$4,984	\$3,378	\$1,170	\$21,505
Percent	56%	23%	16%	5%	100%

#### Option 1

<u>Calendar Year of Retirement</u>		<u>Number</u>	<u>Monthly Benefit</u>	<u>Average Benefit</u>
1973	Male	932	\$245,514	\$263
	Female	1,414	434,077	307
1974	Male	766	199,922	261
	Female	1,284	360,543	281
1975	Male	862	223,429	259
	Female	1,359	397,062	292
1976	Male	1,051	288,697	275
	Female	1,588	471,308	297
1977	Male	1,112	\$321,616	\$289
	Female	1,606	\$477,014	\$297

#### Option 2

<u>Calendar Year of Retirement</u>		<u>Number</u>	<u>Monthly Benefit</u>	<u>Average Benefit</u>
1973	Male	522	\$147,812	\$283
	Female	652	199,597	306
1974	Male	458	121,520	265
	Female	607	179,285	295
1975	Male	418	124,766	298
	Female	497	166,980	336
1976	Male	441	142,964	324
	Female	511	176,892	346
1977	Male	447	160,228	358
	Female	431	154,664	359

(Average Reduction of Option 1 Benefit—Male 6%; Female 2 1/2%—based on members ages 60 through 64)



Option 3

<u>Calendar Year of Retirement</u>		<u>Number</u>	<u>Monthly Benefit</u>	<u>Average Benefit</u>
1973	Male	447	\$104,922	\$235
	Female	246	71,555	291
1974	Male	398	98,359	247
	Female	179	51,607	288
1975	Male	454	114,221	252
	Female	212	60,894	287
1976	Male	486	137,757	283
	Female	246	74,233	302
1977	Male	478	\$152,709	\$319
	Female	233	\$ 79,150	\$340

(Average Reduction of Option 1 Benefit—Male 27%; Female 18%—based on members ages 60 through 64, Female Spouse, 3 years younger; male spouse, 3 years older)

Option 4

<u>Calendar Year of Retirement</u>		<u>Number</u>	<u>Monthly Benefit</u>	<u>Average Benefit</u>
1973	Male	227	\$97,276	\$429
	Female	76	26,832	353
1974	Male	158	62,818	398
	Female	64	20,422	319
1975	Male	173	78,580	454
	Female	81	27,519	340
1976	Male	145	70,752	488
	Female	51	18,025	353
1977	Male	138	\$70,767	\$513
	Female	56	\$19,300	\$345

(Average Reduction of Option 1 Benefit—Male 8%; Female 4.2%—based on members ages 60 through 64, Female Spouse, 3 years younger; male spouse, 3 years older)

## PLAINTIFFS' EXHIBIT 22

STATE OF FLORIDA  
DEPARTMENT OF ADMINISTRATION

Division of Retirement

Mailing Address  
530 Carlton Building  
Tallahassee, Florida 32304

Location  
Cedars Executive Center  
2659 North Monroe Street  
Tallahassee, Florida

(SEAL)

Reuben O'D. Askew  
Governor

Robert L. Kennedy, Jr.

Wallace W. Henderson

State Retirement Director

Secretary of Administration

August 9, 1978

MEMORANDUM

TO: Mr. David Kerns  
General Counsel

FROM: Larry Gibney  
State Retirement Actuary

SUBJECT: Use of Sex-based Actuarial Tables

A member electing an optional mode of settlement for his monthly pension benefit has three (3) choices—10-year certain and life thereafter, 100% survivorship annuity or 100% survivorship annuity reducing to 66⅔% upon the first death. Each of the optional annuities so determined would be less than the benefit payable upon his life only. In determining the actuarial equivalence, we resort to mortality tables that are constructed solely on the gender of each. To attain actuarial equivalence, this has to be done since there is a considerable difference between mor-

talities experienced by a female and male of the same age. In other words, for individuals of the same age, the female will outlive the male.

Recently, the Supreme Court in the case of *City of Los Angeles vs Marie Manhart* ruled that it was discriminatory if females were required to contribute more than males for an identical benefit at retirement. The City of Los Angeles, Department of Water and Power, maintains a contributory defined pension plan under which employee contributions for female employees were 15% higher than for similarly situated male employees; a provision designed to reflect the longer average life expectancy of women. This decision could have far reaching effects in the methodology of determining equivalent benefits as other issues involving discrimination come before the courts.

I note that the Federal government, especially the Internal Revenue Service, continues to use sex-based actuarial tables for computations involving federal estate taxes. For assessment of liabilities in terminated pension plans, the Pension Benefit Guaranty Corporation also uses sex-based actuarial tables.

However, this particular Supreme Court decision did not address the question of the use of sex-based actuarial tables in determining actuarial equivalence; and, accordingly, until this issue is resolved, we feel the continued use of sex-based actuarial tables is appropriate.

LJG:pl

cc: Mr. R. L. Kennedy, Jr.  
Mr. M.T. McNab

---

## PLAINTIFFS' EXHIBIT 23

[10/25/78]

Manhart Case  
Court Case of Oregon

Re: Equality of Benefits—Recent Court Decisions

As you know, there has been considerable publicity concerning the use of sex-segregated actuarial tables in the determination of equivalent benefits. The use of such tables is certainly justified on the basis that nature has endowed the female with certain physiological characteristics that extends their life expectancy appreciably. For true equivalence, the differences on an individual basis cannot be ignored. For example, at age 62, approximately 18% more in dollars is needed to provide the same monthly benefit to a female as would be required for a male. At age 52, the requirement is 15% more in dollars. Logically, one would conclude that for the same benefit, the female should be required to either contribute more or receive less of a benefit.

In the recent Manhart Case, the females were required to contribute 15% more toward their pension. The court, in ruling for the plaintiff concluded that this was in violation of Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, and, accordingly, the female contribution was decreased to that of the male employee. Although the facts of the case deal with a defined benefit plan, the extension of the court's action could inevitably lead to the abolition of sex-segregated tables in determining equivalent benefits when election of an option is permitted. Consequently, it is my opinion that eventually we will be forced to adopt the so-called "unisex" table so that both male and female members receive the same benefits regardless of their sex.

What will be the effect on the financial condition of the fund and more importantly on the benefits derived if we devise a "unisex" table, [etc., as well as the system, if we]\* devise a "unisex" table for determination of our actuarial liability? We will still recognize sex and, consequently, there will be neither gains or losses to the system. For the membership, the differential in benefit will be more pronounced. The male member with a spouse will receive a larger benefit than formerly; whereas, the female member with a spouse will receive less of a benefit. Each will, however, receive the same benefit. For years 1973-1977, 21,505 members retired and of this number 44% opted for a reduced benefit. The percent electing Options 3 and 4, so-called survivorship options, was but 21%. Admittedly, only half of the retirees would be affected but in numbers a change would appear warranted. Although the "unisex" concept may appear innovative, we have been using this concept for many years by employing an early retirement factor of 5/12 of 1% for each month preceding normal retirement date. The true actuarial factors would be higher both for male and female, with the female higher than the male. The method has been used primarily for administrative ease with the fund making up the difference.

In September of this year, a Federal District Court in Oregon rendered a decision which entailed the use of sex-segregated actuarial tables. The Court ruled that Title VII of the Civil Rights Act of 1964 prohibits the use of sex-segregated life expectancy tables in calculating "refund annuity" allowances and, accordingly, the Retirement

---

\* Shown as crossed out by hand in exhibit.

System is restrained from the use of such tables. After July 1, 1978, the system shall provide a monthly "refund annuity" retirement allowance to female members which is identical to the "refund annuity" retirement allowance for males of the same age and amount of contributions. The decision is a direct result of the *Manhart Case*; and, although it does not rule out sex-segregated tables, the solution, in my judgment, was a poor one. It would have been more rational to devise a "unisex" table with the resultants being averaged between the sexes.

The decisions based solely on the concept of equal pay disregards longevity of sexes, but the effect on retirement systems as a whole will be negligible. Accordingly, I feel we should devise a "unisex" table reflecting the sex composition of our system and employ such a table for option reduction factors. Furthermore, the implementation of such tables should originate with the Legislature since its adoption will no doubt elicit comments from a number of organizations whose members would be affected.

LJG:pl  
11/29/78

---



PLAINTIFFS' EXHIBIT 40  
DEPARTMENT OF ADMINISTRATION

Division of Retirement

Mailing Address  
530 Carlton Building  
Tallahassee, Florida 32301

Location  
Cedars Executive Center  
2639 North Monroe Street  
Tallahassee, Florida

(904) 488-5541

(SEAL)

BOB GRAHAM  
Governor

A.J. McMULLIAN III  
State Retirement Director

NEVIN SMITH  
Secretary of Administration

LEWIS M. DENNARD  
Assistant State Retirement  
Director

June 25, 1981

Mr. James L. Sublett  
Secretary-Treasurer  
National Council on Teacher Retirement  
275 East Broad Street  
Columbus, Ohio 43215

Dear Jim:

This is in reply to your May 7 letter concerning "Unisex" actuarial factors. It would appear that this issue is not going away; consequently, we have done quite a bit of "spade" work thus far.

Following the Manhart decision, our State Retirement Actuary, working closely with our Consulting Actuaries, investigated various methods to develop a "Unisex" table in case we were required by the Legislature or courts to adopt such an actuarial table. The approach that we have

settled on which is reflective of the experience of the Florida Retirement System is to categorize by member age, "unisex" factors using joint annuitant ages 20 years younger to 20 years older. We have statistics of member option election by age, and this provided us with the necessary parameters for interpolation. The end result of it all is that the derived "unisex" factors are averages of the factors we are currently using; the new factor would result in a 5 to 8 percent increase in the male benefit and an 8 to 12 percent decrease in the female benefit, assuming both the member and joint annuitant are the same age.

Listed below are our responses to your specific questions:

1. Since we are not changing the mortality table or the interest assumption for our option factors, the expense of developing our "unisex" factors was quite minimal; actuarial fees of \$2,500 plus a computer charge which we absorbed in-house.
2. Based on the assumption there would be a 3-year spread in ages between the member and the joint annuitant, the annual increase in pay-out for our present retirees would be approximately \$350,000. The liability increase would be \$3.5 million. This represents an increase in our retired payroll of .166% and the liability increase would be .151%. (If we were to assume, however, that female benefits would not be decreased, then the corresponding amounts would be \$1.2 million pay-out annually and \$12 million for the liability increase. In each—retired payroll increase and liability increase—the percentage increase would be approximately  $\frac{1}{2}$  of 1%.)
3. If we were forced to make retroactive adjustments, the cost would be at least 3 times the amounts

cited above, based on the number of years elapsed since April 1978.

We would appreciate any information you may receive from the other states as it would be interesting to compare our approach with others.

Sincerely,

/s/ A. J. McMullian III  
A. J. McMullian III  
State Retirement Director

AJM/na

---

Hughlan LONG and S. Dewey Haas, individually and on behalf of all retired and present employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, and all joint annuitants thereunder, Plaintiffs-Appellees, Cross-Appellants,

v.

The STATE OF FLORIDA, a governmental body, and the Honorable Robert Graham, as Governor of the State of Florida, Defendants-Appellants, Cross-Appellees.

Nos. 86-3282, 86-3410.

United States Court of Appeals,  
Eleventh Circuit.

Dec. 19, 1986.

Opinion on Denial of Rehearing  
Feb. 19, 1987.

State employees brought class action under Title VII, alleging that state officials charged with administering state retirement plan had unlawfully calculated their benefits based on sex-distinct mortality tables. The United States District Court for the Northern District of Florida, No. TCA 82-1056-09, William Stafford, Chief Judge, entered summary judgment for employees on liability issue and awarded damages. Appeal was taken. The Court of Appeals, Godbold, Circuit Judge, held that: (1) state committed separate, actionable discriminatory acts each time it issued disparate retirement checks, so that every retiree who received such a check within 300 days of filing of any of EEOC charges could join in class litigation; (2) state was put on notice by Supreme Court decision that it could not rely on sex-distinct mortality tables to determine bene-

fits, so that state violated Title VII by continuing to use such tables; (3) employees were entitled to retroactive relief; and (4) employees were entitled to "topping up" of benefits only to level that they would have received under sex-neutral mortality tables.

Affirmed.

#### 1. Judgment 828(3.42)

State employee's Title VII claim was not barred by res judicata or collateral estoppel, though employee had earlier participated in state court action challenging state retirement system's use of sex-distinct mortality tables on equal protection grounds, as employee could not have brought Title VII action in state court. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

#### 2. Federal Civil Procedure 184.25

To participate in class litigation under Title VII, employee must be victim of some discriminatory event that occurred no more than 300 days prior to filing of any of EEOC charges. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

#### 3. Federal Civil Procedure 184.25

State committed "separate, actionable discriminatory act" each time that it paid state employees retirement benefits based on sex-distinct mortality tables; accordingly, each retiree who received retirement benefits within 300 days of filing of any of EEOC charges could participate in retirees' class litigation against state under Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

See publication Words and Phrases for other judicial constructions and definitions.

#### 4. Civil Rights 32(3)

State officials had notice of employees' Title VII claims, though officials were neither named as respondents nor mentioned in employees' EEOC charges, where officials were sued in official capacities as chief executives of affected state agencies and departments administering state's retirement program. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

#### 5. Federal Courts 755

Trial court's finding, that state was put on notice by Supreme Court decision that it could not calculate retirement benefits for its employees based on sex-distinct mortality tables, was question of law subject to review under error of law standard.

#### 6. Civil Rights 9.14

State was put on notice by Supreme Court decision that it could not calculate retirement benefits for its employees based on sex-distinct mortality tables, so that state violated Title VII by continuing to offer pension plans that discriminated against males; declining to follow *Probe v. State Teachers' Retirement System*, 780 F.2d 776 (9th Cir.).

#### 7. Civil Rights 46(11)

District court order, requiring "topping up" of retirement benefits paid to retired state employees under state retirement plan, did not constitute unlawful retroactive relief, where retirement benefits were not directly



based on employees' contributions to plan. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Federal Courts 858

District court's finding that state did not act in bad faith, in calculating retirement benefits payable to its employees based on sex-distinct mortality tables, was finding of fact subject to clearly erroneous standard of review in retirees' Title VII suit for prospective and retroactive relief. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. Civil Rights 44(5)

District court's finding that state did not act in bad faith in calculating retirement benefits payable to its employees based on sex-distinct mortality tables was not clearly erroneous, for purpose of deciding whether male employees adversely affected by state's action were entitled to retroactive relief, where state officials charged with administering retirement plan had relied on advice of counsel that use of sex-distinct tables was not prohibited.

10. Civil Rights 46(11)

Retired state employees were entitled to retroactive relief to compensate them for reduced retirement benefits they received based on state's improper use of sex-distinct mortality tables, to extent that state Supreme Court decision should have placed state on notice that its use of sex-distinct mortality tables was improper, where state's retirement fund had surplus of over \$200 million and impact on pension funds and innocent third parties, though burdensome, would not be devastating.

11. Civil Rights 46(14)

In Title VII action, state employees that received reduced retirement benefits based on state's improper use of sex-distinct mortality tables were entitled to a "topping up" of benefits only to level that they would have received under sex-neutral tables, and not to level that female retirees received under sex-distinct tables, though female retirees had acquired vested right to benefits and would accordingly be compensated at higher level. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

12. Civil Rights 46(14)

Retroactive and prospective relief awarded to retired state employees in Title VII action, arising out of state's improper use of sex-distinct mortality tables to calculate retirement benefits, would not be prorated in accordance with employees' contributions to retirement fund, where retirement benefits were not based on individual contributions to fund.

---

Mang & Stowell, Douglas A. Mang, Charles T. Collette, Gary J. Anton, Augustus Aikens, Jr., General Counsel, Dept. of Admin., Tallahassee, Fla., for defendants-appellants, cross-appellees.

Jerold Feuer, Ruden, Barnett, McClosky, Schuster & Russell, Woodrow M. Melvin, Jr., Cindy Niad-Hannah, Keith Olin, David Popper, Popper and Popper, Miami, Fla., for plaintiffs-appellees, cross-appellants.

David V. Kerns, pro se.

McGuinness & Williams, Robert E. Williams, Douglas S. McDowell, Garen E. Dodge, Washington, D.C., amici curiae.

Appeals from the United States District Court for the Northern District of Florida.

Before GODBOLD and FAY, Circuit Judges, and ATKINS\*, Senior District Judge.

GODBOLD, Circuit Judge:

Plaintiffs brought this class action under Title VII of the Civil Rights Act of 1964 against the Florida Retirement System ("FRS") for sex discrimination in the administration of its pension plans. Plaintiff class consists of two subclasses: subclass A includes retired male employees who retired after March 24, 1972 and before August 1, 1983 and who elected to receive their pension benefits under one of the three joint-annuitant options of the FRS, and subclass B includes males presently employed by the FRS who are vested in the system because of ten years of service but who have not yet retired.

On cross-motions for summary judgment the district court found for plaintiff class because the Supreme Court's decision in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) put the FRS on notice that it could not rely on sex-distinct mortality tables to determine optional benefits, and, therefore, the FRS violated Title VII by offering pension plans that discriminated against males. The district court reserved ruling on damages until it could conduct an evi-

\* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

dentiary hearing on the impact of such damages. After a four-day hearing, the district court concluded that all members of subclass A were entitled to prospective "topping up"<sup>1</sup> of their monthly retirement benefits to Florida's current unisex level<sup>2</sup> commencing on April 30, 1986,<sup>3</sup> which would cost the state approximately \$32.3 million. The district court further found that all retirees of subclass A who retired after October 1, 1978 were entitled to retroactive topping up from that date to April 30, 1986, which would cost the state approximately \$11.3 million. We affirm.

### I. *Factual Background*

The FRS has operated a defined benefit pension plan<sup>4</sup> since 1970. The system serves over 1,100 Florida local governments as well as the state, its agencies, and the

1. By ordering the topping up of benefits, a court requires the defendant to pay the plaintiffs the difference between the benefits they actually received and the benefits they would have received had the defendant relied on the proper mortality tables.
2. Under unisex, or sex-neutral, mortality tables annuities are based on the average life expectancies of male and female employees. This results in higher benefits to male employees and lower benefits to female employees than provided under sex-distinct mortality tables. The FRS voluntarily switched to unisex mortality tables for all employees retiring after August 1, 1983.
3. The district court ruled that the date of judgment, for purposes of damages, was April 30, 1986. The parties do not dispute this date as the proper date for setting damages. The actual date of the final judgment and order was May 29, 1986.
4. In a defined benefit pension plan the employer or pension fund guarantees a certain level of benefits to retirees regardless of whether the contributions collected adequately cover the benefits.



state university system. Since its inception the FRS has offered four retirement plans: its primary, single-life plan and three joint-annuitant, optional plans. Under Option 1, the primary benefit plan, a retiree receives a percentage of his average high salary for the past five years. This percentage is based on his number of years of service. If a retiree wants his pension benefits to continue through his spouse's or another beneficiary's life, then he can choose one of the three optional, joint-annuitant plans. Option 2 is a joint and survivorship option payable for a fixed period of ten years. Option 3 is a joint-annuitant option payable for the joint lives of the retiree and his beneficiary. Option 4 is a joint-annuitant option payable to the retiree and his beneficiary for their joint lives but which, upon the death of either, reduces by one third the monthly benefits payable to the remaining life. Fla.Stat. Ann. § 121.091(6) (1982 & Supp.1986). Until August 1, 1983 the FRS based the joint annuities under these options on sex-distinct mortality tables, which resulted in lower monthly benefits to male retirees. For all employees retiring on or after August 1, 1983, the FRS now bases the joint annuities on sex-neutral mortality tables.

Since the creation of the FRS similarly situated males and females have contributed the same amounts and received the same primary benefits under Option 1. From 1970 to 1975 the FRS was funded by contributions from both employees and employers. Since 1975 the system has been funded exclusively by employer contributions, except for elected state officers. Because the employers are state and local governments and agencies, employer contributions come from public funds. All contributions to the sys-

tem, except those for elected state officers, are based on a percentage of the gross compensation of participating employees. *Id.* § 121.071. Upon retirement an employee's right to a certain level of benefits under the system vests, and the system cannot reduce the retiree's benefits in the future. The FRS also must collect enough contributions to maintain the system "on a sound actuarial basis," which includes funding for current and projected operating expenses and funding to eliminate over time the unfunded accrued actuarial liability. Fla. Const. art. X, § 14. The Florida legislature can increase or reduce the contribution rates as needed for the FRS to fulfill its obligations. See Fla.Stat. Ann. § 121.061.

## II. Preliminary Issues

[1] The FRS raises several issues regarding the class, its claims, and the proper defendants. First, the FRS argues that plaintiff Long's claim against the system must be dismissed because it is barred by collateral estoppel (issue preclusion) or res judicata (claim preclusion) based on *Long v. Department of Admin.*, 428 So.2d 688 (Fla. Dist. Ct. App. 1983). This argument is without merit. The *Long* court held that the FRS's use of sex-distinct mortality tables did not violate the equal protection clauses of the federal and Florida constitutions. *Id.* at 643. There is no collateral estoppel because the Florida court did not rule on Long's Title VII claim and Long did not assert a claim under Florida's employment discrimination statute, which is substantially similar to Title VII. *School Bd. of Leon County v. Hargis*, 400 So.2d 103, 108 n. 2 (Fla. Dist. Ct. App. 1981). There is no res judicata because Long could not have brought his Title VII action in state court, and



the fact that he could have asserted a similar state employment discrimination claim in the original administrative hearing or its subsequent appeal does not bar a later Title VII claim. *Cf. Thomson v. Petherbridge*, 472 So.2d 773, 775 (Fla. Dist. Ct. App. 1985); *Pumo v. Pumo*, 405 So.2d 224, 226 (Fla. Dist. Ct. App. 1981), *petition for review denied*, 412 So.2d 469 (Fla. 1982).

[2, 3] Second, the FRS asserts that the certified class is improper because neither plaintiff Samaha's EEOC charge of December 27, 1979 nor plaintiff Rassler's EEOC charge of May 5, 1979 provided the system with adequate notice as required by Title VII. The FRS claims, therefore, that only plaintiff Long's EEOC charge of October 7, 1981, if not barred by collateral estoppel or res judicata, or plaintiff Rassler's amended EEOC charge of August 24, 1981, can be used to establish a cut-off date for class membership, which would include only those employees who retired within 300 days of the EEOC charge. Under Title VII the discriminatory event against each employee must take place within the requisite time frame before such an employee can be included in the class. *Payne v. Travel Laboratories, Inc.*, 673 F.2d 798, 813 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 451, 74 L.Ed.2d 605 (1982). The discriminatory event here is not the date of retirement for each employee, as the FRS contends; rather, each month's disparate retirement check constitutes a separate actionable discriminatory event and therefore a continuing violation. *See Bazemore v. Friday*, — U.S. —, 106 S.Ct. 3000, 3006, 92 L.Ed.2d 315 (1986); *Perez v. Laredo Junior College*, 706 F.2d 731, 733-34 (5th Cir. 1983), *cert. denied*, 464 U.S. 1042, 104 S.Ct. 708, 79 L.Ed.2d 172 (1984). As a result every retiree who received

retirement benefits within 300 days of any of the EEOC charges is properly within the class.

[4] Third, the FRS contends that the district court erred in failing to dismiss the individually named defendants, Robert Graham, Gilda Lambert, and Andrew McMullian, III,<sup>5</sup> because they were neither named as respondents nor mentioned in any of the plaintiffs' EEOC charges. This argument is also without merit. These defendants were sued in their official capacities only. Although the EEOC charges failed to name these defendants specifically, they had notice of the charges through their official roles as chief executives of the affected state agencies and departments. Fla. Stat. Ann. §§ 20.04(3)(a), .31(1), .31(2)(c) (Supp. 1986). The district court did not err in refusing to dismiss these defendants because they were within "the scope of the EEOC investigation which could reasonably grow out of the administrative charge[s]." *Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1123 (5th Cir. Unit B 1981); *see also Hamm v. Members of the Bd. of Regents of the State of Florida*, 708 F.2d 647, 650 (11th Cir. 1983); *Tillman v. City of Boaz*, 548 F.2d 592, 594 (5th Cir. 1977).

### III. Substantive Issues

#### A. Notice

[5] The district court held that the FRS was on notice that it had to base its optional benefits on sex-neutral

5. Robert Graham is the Governor of Florida; Gilda Lambert is the secretary of the Florida Department of Administration; and Andrew McMullian, III, is the director of the Division of Retirement within the Florida Department of Administration.

tables as of the Supreme Court's decision in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978). In reaching this conclusion the district court expressly rejected the system's argument that the law was unsettled regarding pension fund responsibilities for optional pension plans until the Supreme Court's decision in *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983). We agree.<sup>6</sup>

[6] In *Manhart* the Supreme Court held that it was illegal for an employer to require female employees to pay higher contributions to an employee pension plan than similarly situated males in order to receive the same benefits at retirement, even if these payments were based on actuarially valid mortality tables for males and females which reflect the fact that, as a class, women live longer than men. *Manhart*, 435 U.S. at 708-09, 98 S.Ct. at 1375. The Court reasoned that Title VII focuses on fairness to the individual rather than to classes of individuals. *Id.* at

6. Plaintiff class argues that the district court's finding that the FRS was on notice that it had to base its optional pension plans on sex-neutral mortality tables as of 1978 was a finding of fact subject to the clearly erroneous standard of review. Although the district court considered evidence regarding whether the system administrators actually knew that their optional pension plans violated Title VII, the district court's decision ultimately turned on whether the language of the *Manhart* decision put a reasonable employer on notice that it must convert to sex-neutral mortality tables. Therefore, the district court's finding that the FRS was on notice as of the Supreme Court's 1978 decision in *Manhart* is a question of law subject to review under the error of law standard.

709, 98 S.Ct. at 1375. Under the plan at issue in *Manhart*, all females had to pay higher contributions to the pension plan, even though individual females might live longer than similarly situated males. Consequently, while these females were working, they "received smaller paychecks because of their sex, but they will receive no compensating advantage when they retire." *Id.* at 708, 98 S.Ct. at 1375.

The Supreme Court carved out a limited exception to its ruling by holding that it would not "be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." *Id.* at 717-18, 98 S.Ct. at 1379-80.

In *Norris* the Supreme Court reexamined the *Manhart* "open market" exception. In *Norris* the state employer applied sex-neutral mortality tables to its primary, single-life retirement benefits, as required by *Manhart*. The employer also offered an optional deferred compensation plan. After inviting private insurance companies to submit bids outlining the investment opportunities that they might offer state employees, the employer selected several of these companies to participate in its optional plans. Although an employee was free to choose among the different insurance companies, they offered essentially the same retirement plans, one of which resulted in lower monthly retirement benefits to male retirees. The Supreme Court held, in a plurality opinion, that because an employer would have violated Title VII if it had offered

the annuity option based on sex-distinct mortality tables itself, it violated Title VII when it offered such an option through insurance companies it had selected. *Id.* 463 U.S. at 1089, 103 S.Ct. at 3501.

Although its optional pension plans were clearly impermissible under *Norris*, the FRS argues that it reasonably relied on the *Manhart* open market exception until the *Norris* decision and offered as options in its pension plans annuities that reflected annuities available on the open market. The system relies primarily on the Ninth Circuit's decision in *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 782-83 (9th Cir.), *cert. denied*, — U.S. —, 106 S.Ct. 2891, 90 L.Ed.2d 978 (1986), which reached this conclusion under similar facts. The district court found that *Probe* was wrong as a matter of law. We agree.

First, although *Manhart* only addressed contributions to a pension plan, its reasoning applies equally to benefits paid out under a pension plan. Second, and most important, the open market exception applies exclusively to third parties, and, therefore, a reasonable employer knew or shown have known that its own optional annuity plans based on sex-distinct mortality tables were impermissible under Title VII. The Supreme Court created the open market exception in *Manhart* because "Title VII . . . primarily govern[s] relations between employees and their employer, not between employees and third parties." *Manhart*, 435 U.S. at 718 n. 33, 98 S.Ct. at 1380 n. 33. As Justice O'Connor later explained in *Norris*, whether the Court believed that the insurance industry should use sex-neutral mortality tables was irrelevant; the decision was up to Congress, which had chosen to limit the scope of Title

VII to employers and employees. *Norris*, 463 U.S. at 1107, 103 S.Ct. at 3511 (O'Connor, J., concurring). No matter how the FRS describes its optional pension plans, the end result is that the system, as an employer, offered pension plans based on sex-distinct mortality tables, which was expressly prohibited by the Supreme Court in *Manhart*.

#### B. Prospective relief

[7] The district court properly ordered the topping up of benefits for all subclass A retirees as of the date of judgment. The FRS cannot continue to discriminate against plaintiff class. The system argues, however, that the prospective relief ordered here really constitutes retroactive relief and is therefore subject to the restrictions on retroactive awards announced by the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). This argument has no merit in this case.

"When a court directs a change in benefits based on contributions made before the court's order, the court is awarding relief that is fundamentally retroactive in nature." *Norris*, 463 U.S. at 1092, 103 S.Ct. at 3501 (Marshall, J., concurring in part). This result is true because to the extent that a retirement plan represents a return on contributions made during the employee's working years that were intended to fund completely the benefits which that employee would receive in the future, any additional relief would have to come from an outside source. The Supreme Court struggled with this issue in *Norris* and ultimately concluded that topping up of retirees' benefits as of the date of judgment was impermissible where the court had already determined that retroactive relief was inappropriate. *Id.* at 1105-07, 103 S.Ct. at 3510-11 (Pow-



ell, J., dissenting in part and concurring in part); *id.* at 1111, 103 S.Ct. at 3513 (O'Connor, J., concurring).

The Second Circuit considered this problem in *Spirt v. Teacher's Ins. & Annuity Assoc.*, 735 F.2d 23 (2d Cir.), *cert. denied*, 469 U.S. 881, 105 S.Ct. 247, 83 L.Ed.2d 185 (1984). The Second Circuit recognized that prospective topping up was actually retroactive relief when such an award would affect a portion of benefits attributable to contributions made prior to the date of judgment. *Id.* at 26. The court concluded, however, that such concepts of retroactivity did not apply under the facts before it because the retirement plan in question did not guarantee certain benefits upon retirement. Thus, the court reasoned, the benefits were not based on the amount of contributions made on behalf of each employee, and any topping up would not constitute retroactive relief. *Id.* at 26-27.

This same reasoning applies to the FRS plans. Almost all contributions made to the system since 1975 were made by employers using public funds. Such contributions were not made on behalf of individual employees. Rather the legislature set the employer contribution rates to cover current and future operating expenses and funding for the system's unfunded accrued actuarial liability. Consequently the benefits paid out of the fund were not directly based on the contributions paid into the fund. The district court's order to top up benefits for all subclass A retirees as of the date of judgment therefore constitutes prospective relief and is clearly permissible.

### C. Retroactive relief

The district court awarded retroactive benefits to all subclass A retirees who retired after October 1, 1978.<sup>7</sup> The district court declined to award retroactive benefits to subclass A retirees who retired prior to October 1, 1978. We agree.

The Supreme Court has said that in a Title VII case, "given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975). The Supreme Court refused to award retroactive damages in both *Manhart* and *Norris*. The Court relied on the equitable considerations announced by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971): (1) whether the decision "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) "whether retrospective operation will further or retard [the statute's] operation"; and (3) whether the decision would "produce substantial inequitable re-

7. Although the Supreme Court decided *Manhart* on May 1, 1978, the district court ruled that the FRS was liable to plaintiff class for retroactive damages only as of October 1, 1978. The district court explained that a pension plan needed a reasonable amount of time within which to change the plan and comply with the new *Manhart* rule. Neither party challenges this date as the date by which a pension fund must comply with *Manhart*.

sults if applied retroactively." *Id.* at 106-07, 92 S.Ct. at 355 (citations omitted); *see also Norris*, 463 U.S. at 1106-07, 103 S.Ct. 3510-11 (Powell, J., dissenting in part and concurring in part); *id.* at 1109-10 (O'Connor, J., concurring); *Manhart*, 435 U.S. at 720-21, 98 S.Ct. at 1381-82.

In *Manhart* the Supreme Court recognized that "pension administrators could reasonably have thought it unfair—or even illegal—to make male employees shoulder more than their 'actuarial share' of the pension burden." *Manhart*, 435 U.S. at 720, 98 S.Ct. at 1381. Administrators had no reason to expect that the Court would prohibit pension funds from relying on actuarially sound sex-distinct mortality tables and did not need the threat of a backpay award to cause them to amend their practices to conform to the new rule. *Id.* at 721, 98 S.Ct. at 1382. Furthermore, the award of retroactive damages would have a potentially devastating effect on the insurance and pension industry, most of whom offered annuities based on sex-distinct mortality tables. *Id.* The Court, therefore, refused to award the plaintiffs retroactive relief.

In *Norris* the Supreme Court similarly refused to award retroactive relief. Justice Powell explained that employers could reasonably have relied on the *Manhart* open market exception to offer annuities in its pension fund like those offered by insurance companies on the open market. *Norris*, 463 U.S. at 1106, 103 S.Ct. at 3510 (Powell, J., dissenting in part and concurring in part). Moreover, "holding employers liable retroactively would have devastating results." *Id.* Justice O'Connor agreed that the decision should only be applied prospectively. She recognized that the employer's reliance on the open mar-

ket exception was reasonable. She further noted that a retroactive award would not further the operation of Title VII and would likely impose inequitable results. *Id.* at 1109-10, 103 S.Ct. at 3512 (O'Connor, J., concurring).

Before applying the equitable considerations to the facts here, we must consider whether the FRS acted in bad faith. In *Albemarle*, the Supreme Court held that equity does not come into play where the employer acted in bad faith. *Albemarle*, 422 U.S. at 422-23, 95 S.Ct. at 2373-74. An employer acts in bad faith "by maintaining a practice which he knew to be illegal or of highly questionable legality." *Id.* at 422, 95 S.Ct. at 2373. Plaintiff class argues that because the district court found that *Manhart* provided adequate notice and the system had actual notice from internal memoranda and discussions, a finding of bad faith is compelled as a matter of law, and an award of back benefits is required.

[8, 9] Even though the district court's finding of lack of bad faith may constitute an ultimate fact, it is not a conclusion of law, and the district court's finding is subject to the clearly erroneous standard of review. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982); *Matthews v. United States*, 713 F.2d 677, 681 (11th Cir.1983). Given the district court's findings that the FRS administrators reasonably relied on the advice of David Kerns, general counsel for the Florida Department of Administration, and Nevin Smith, then secretary of the Department of Administration, that *Manhart* did not affect their optional annuity plans, a finding of lack of bad faith is not clearly erroneous. *Cf. International Food & Beverage Systems*



*v. Fort Lauderdale*, 794 F.2d 1520, 1526 (11th Cir.1986) (“[B]ad faith . . . is not lightly imputed to public officials: proof of bad faith must be ‘irrefragible,’ i.e. pretty strong and assimilated with a specific intent to inflict injury.”).

[10] Applying the equitable consideration here, the district court properly concluded that the FRS was liable for benefits not paid to subclass A retirees as of October 1, 1978. First, the system knew or should have known since the Supreme Court’s decision in *Manhart* that any benefits based on sex-distinct mortality tables was impermissible under Title VII. Second, the award of retroactive relief would not “retard the operation” or “frustrate the purpose” of Title VII. The system’s argument that retroactive relief is not needed to encourage it and other employers to follow this “new” interpretation of Title VII is unpersuasive. Third, although the impact on pension funds and innocent third parties may be burdensome, it will not be devastating.

The district court found that the Florida legislature increased the system’s contribution rates in 1984, creating a surplus in the fund of over \$200 million. This finding of fact, based primarily on the testimony of the FRS consulting actuary, is supported by sufficient evidence and is not clearly erroneous. As a result the impact on Florida taxpayers is not great. The district court’s refusal to consider evidence of the impact on pension funds on the national level was also not in error. *Manhart* put all pension funds on notice that benefits could not be based on sex-distinct mortality tables; all funds, like the FRS, were forewarned and should have converted to sex-neutral mortality tables at that time. The impact on those pension

funds that failed to follow the law after *Manhart* should not be considered here.

For these reasons the district court’s order topping up benefits with interest from October 1, 1978 to the date of judgment for all subclass A retirees who retired after October 1, 1978 is correct. The same reasoning, however, does not apply to subclass A retirees who retired before October 1, 1978. The *Manhart* decision put all pension plans on notice that they could no longer offer pension plans based on sex-distinct mortality tables. The *Manhart* court, however, refused to apply its ruling retroactively to employees who retired prior to the date of judgment because a pension fund was not on notice then that such laws violated Title VII. It would be inconsistent now to apply this court’s ruling retroactively to employees who were not affected by the *Manhart* decision itself.

#### *D. Topping up under the unisex method*

[11] The district court properly ordered the retroactive and prospective topping up of benefits under the unisex method of calculation. Under this method male benefits are raised to that level which males would have received had sex-neutral mortality tables been applied to their original benefits. Plaintiff class argues that if this method of topping up is adopted, members of subclass A will continue to receive smaller pension benefits than equally situated females who retired prior to August 1, 1983. This is true because these female retirees have a vested right to the same level of benefits they received under the sex-distinct mortality tables, which are higher than the benefits they would have received under the unisex method. Plaintiff class argues, therefore, that only



by topping up benefits for male retirees and their female beneficiaries to the level of benefits for females who retired prior to August 1, 1983 can the court make the parties equal.

Plaintiff class misconstrues the purpose of Title VII. Title VII does not require equalization; it only requires that plaintiffs be made whole. "The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Albemarle*, 422 U.S. at 418-19, 95 S.Ct. at 2372 (quoting *Wicker v. Hoppsek*, 73 U.S. (6 Wall.) 94, 99, 18 L.Ed. 752 (1867)). The district court, therefore, was correct in ordering relief under the unisex method of calculation.

#### *E. Proration*

[12] The district court properly refused to prorate its awards of retroactive and prospective relief. The FRS contends that if any relief is granted it should be prorated to the percentage of the benefits not based on previous contributions by or on behalf of the individual employees. Although the district court considered testimony by the system's consulting actuary regarding the mechanics of proration, the district court refused to prorate the award. As mentioned above, benefits in the FRS are not based on individual contributions for individual employees. Instead the legislature sets a contribution rate for the employer based on the pension plan's financial needs. The Florida legislature has the power and responsibility to increase the contribution rates periodically to cover operating costs and the unfunded accrued actuarial liability. Therefore, benefits are not based on contributions previously made into the system and proration is inappropriate.

#### IV. Conclusion

The FRS was on notice as of the Supreme Court's decision in *Mankart* that it had to base its optional pension benefits on sex-neutral mortality tables. The district court, therefore, properly ordered the topping up of all subclass A retirees' benefits to the level they would have received had the FRS relied on sex-neutral tables. The district court's further award of retroactive topping up to all subclass A retirees who retired after October 1, 1978 is also correct.

AFFIRMED.

#### ON PETITION FOR REHEARING

PER CURIAM:

On the issue of bad faith, the petition for rehearing correctly notes that the district court did not find that the Florida Retirement System advisors "reasonably relied" on the advice of the general counsel, and the secretary of the Florida Department of Administration. Pp. 1549-50. This does not change our conclusion that the district court did not err in finding defendants were not guilty of bad faith and does not compel this court to find bad faith as a matter of law. The district court did find that the defendants' policy was "a product of poor judgment" but that "[n]one of the principals involved in the decision-making harbored any evil intent or design." Rather they refused to act based on a "misplaced assumption that there would be no retroactive damage award". These subsidiary findings do not require a conclusion of bad faith.

The petition for rehearing is DENIED.

SUPREME COURT OF THE UNITED STATES

No. 86-1685

Florida, et al.,

Petitioners,

v.

Hughlan Long, et al.

ORDER ALLOWING CERTIORARI. Filed October 5,  
1987.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted limited to Questions 1, 2(A), 2(B) and 2(C) presented by the petition.

---

# **PETITIONER'S BRIEF**



7  
No. 86-1685

Supreme Court, U.S.  
FILED

NOV 27 1987

In The  
**Supreme Court of the United States**  
October Term, 1987

JOSEPH E. SPANIOLO, JR.

STATE OF FLORIDA, *et al.*,  
*Petitioners,*  
v.

HUGHLAN LONG, S. Dewey Haas, and Carl Rassler,  
individually and on behalf of all retired and present  
male employees subject to the Florida Retirement Sys-  
tem established by Chapter 121, Florida Statutes, as  
well as the surviving joint annuitants of any deceased  
retired male employees,

*Respondents.*

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONERS

CHARLES T. COLLETTE  
Counsel of Record  
DOUGLAS A. MANG  
BRUCE A. MINNICK  
Mang, Rett & Collette, P.A.  
Post Office Box 11127  
Tallahassee, FL 32302-3127  
(904) 222-7710

AUGUSTUS D. AIKENS, JR.  
General Counsel  
Florida Department of  
Administration  
435 Carlton Building  
Tallahassee, FL 32399-1550  
(904) 488-4747

*Attorneys for Petitioners*

## QUESTIONS PRESENTED

(1) In this Title VII sex-discrimination pension benefit case against a state-operated defined benefit pension plan, does *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris*, 463 U.S. 1073 ("Norris"), bar the award of retroactive relief to pre-August 1, 1983 male retirees (in the form of both retrospective and prospective topping up of optional joint-annuitant pension benefits), as the 9th Circuit held in *Probe v. State Teachers' Retirement System*, 780 F.2d 776 (9th Cir.), *cert. denied*, — U.S. —, 90 L.Ed.2d 978 (1986) ("Probe"), with respect to a state-operated defined benefit pension plan in all essential respects identical to the one here at issue, or does *Norris* permit the award of such relief as the 11th Circuit (specifically disagreeing and conflicting with the 9th Circuit's *Probe* decision) has held herein?

(2)(A) Alternatively, should the date of *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) ("Manhart"), rather than the date of *Norris* be deemed herein controlling, do *Manhart* and *Norris* nevertheless bar the award of relief to pre-*Manhart* retirees as the 9th Circuit held in *Retired Public Employees' Ass'n of California v. State of California*, 799 F.2d 511 (9th Cir. 1986), with respect to a state-operated defined benefit pension plan, or do *Manhart* and *Norris* permit the award of relief to pre-*Manhart* retirees as the 11th Circuit has held herein?

(2)(B) Alternatively, should the date of *Manhart* rather than the date of *Norris* be deemed herein controlling, does *Norris* nevertheless compel the proration of the

award of retirement benefits herein to reflect only those benefits attributable to post-*Manhart* contributions?

(2)(C) Alternatively, should the date of *Manhart* rather than the date of *Norris* be deemed herein controlling, must the class of pre-August 1, 1983 retirees include only those males (or their surviving joint annuitants) who retired no more than 300 days prior to the July 2, 1982 filing of the initial class action complaint in this cause or, at best, no more than 300 days prior to the filing of an appropriate EEOC administrative charge of discrimination by a proper named representative plaintiff, and must the liability cut-off date for the award of relief extend back no more than two years prior to the filing of such EEOC charge?

## PARTIES TO THE PROCEEDING

Petitioners in this Court—the STATE OF FLORIDA, BOB MARTINEZ in his official capacity as Governor of the State of Florida<sup>1</sup> ADIS MARIA VILA in her official capacity as Secretary (i.e., chief executive officer) of the State's Department of Administration,<sup>2</sup> and ANDREW J. McMULLIAN, III, in his official capacity as Director (i.e., chief executive officer) of the Division of Retirement in the State's Department of Administration—were appellants/cross-appellees in the 11th Circuit and defendants in the trial court (the U.S. District Court for the Northern District of Florida, Tallahassee Division).

Respondents in this Court—initial plaintiffs HUGHLAN LONG and S. DEWEY HAAS and intervening plaintiff CARL RASSLER—were appellees/cross-appellants in the 11th Circuit and plaintiffs in the trial court.

Additionally, there are two plaintiff subclasses in this case. The first is a noticed subclass (subclass "A") which consists of those males who retired under the Florida Retirement System ("FRS") after March 24, 1972 (the date Title VII was made applicable to the States), and before

---

<sup>1</sup>By operation of *Fed.R.App.P.* 43(c)(1), Bob Martinez has been substituted in place of Robert Graham, the previous Governor of Florida.

<sup>2</sup>By operation of *Fed.R.App.P.* 43(c)(1), Adis Maria Vila has been substituted in place of Gilda Lambert, the previous Secretary of the State's Department of Administration ("DOA"). In turn, by operation of *Fed.R.Civ.P.* 25(d)(1), Gilda Lambert was earlier substituted in place of Nevin Smith, who was Secretary of DOA at the time of the events herein complained of and an initially named defendant in the trial court (see *Pet.App.* at A38, ¶ 2, & A101, ¶ 2).



August 1, 1983, and who elected one of the three FRS optional joint-annuitant retirement benefits (either Option 2, 3, or 4). This first noticed subclass also includes the surviving joint annuitants or beneficiaries of any such deceased male retirees.

The second is an unnoticed subclass (subclass "B") which consists of those males who retired under the FRS on or after August 1, 1983, and who also elected FRS joint-annuitant retirement benefit Option 2, 3, or 4, or the surviving joint annuitants or beneficiaries of any such deceased male retirees. This second unnoticed subclass also includes those presently unretired male members of the FRS, whether or not currently employed by the state of one of its 1,100 plus FRS participating political subdivisions, who have obtained a vested right to receive retirement benefits under the FRS upon reaching age of retirement (*see* Pet.App. at A45, ¶ 39, & A107, ¶ 39).<sup>3</sup>

Finally, DAVID V. KERNS, ESQUIRE (former General Counsel of the State's Department of Administration), is a noticed unnamed class member herein appearing on his own behalf. While technically a class member respondent in this Court, Mr. Kerns testified on the State's behalf at the district court trial in this matter, filed a brief on

---

<sup>3</sup>As for this second post-August 1, 1983 subclass, the district court found that the unisex mortality tables adopted by the State effective August 1, 1983, "do produce an equal monthly benefit for identically situated males and females retiring on or after August 1, 1983" (*see* Pet.App. at A53, ¶ 44), and awarded them no relief. This denial of relief was not appealed to the 11th Circuit, and thus this post-August 1, 1983 subclass and the denial of relief thereto are not before this Court.

the State's behalf in the 11th Circuit, and filed a brief in support of the State's certiorari petition in this Court.

Similarly, JUDSON FREEMAN, ESQUIRE, is a noticed unnamed class member herein appearing on his own behalf. He has taken no known active involvement in any of the proceedings in this case.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
PARTIES TO THE PROCEEDING .....	iii
TABLE OF CONTENTS .....	vi
TABLE OF AUTHORITIES .....	viii
PREFACE REGARDING PARTY & RECORD REFERENCES .....	xii
OPINIONS BELOW .....	1
JURISDICTION .....	1
STATUTES INVOLVED .....	3
STATEMENT OF THE CASE .....	4
I. <i>Proceedings Below</i> .....	4
II. <i>Facts Re Florida Retirement System</i> .....	8
III. <i>Facts Re Plaintiffs</i> .....	16
SUMMARY OF ARGUMENT .....	18
ARGUMENT .....	22
I. BECAUSE <i>NORRIS</i> , AS A MATTER OF LAW, DECLARED A BROAD EQUITABLE RULE OF RELIEF IN TITLE VII SEX- DISCRIMINATION PENSION BENEFIT CASES THAT PENSION PLANS COULD CONTINUE TO PAY BENEFITS ON THE BASIS OF SEX-DISTINCT MORTALITY TABLES TO PERSONS WHO RETIRED PRIOR TO AUGUST 1, 1983, THE AWARD OF RELIEF TO PLAINTIFFS AND THE PLAINTIFF CLASS (WHO ARE ALL PRE- AUGUST 1, 1983 RETIREES) MUST BE SET ASIDE, AND THIS CASE DISMISSED FOR LACK OF REDRESSABLE INJURY. ....	22

## TABLE OF CONTENTS (Cont'd)

	Page
II(A). ALTERNATIVELY, <i>MANHART</i> AND <i>NOR- RIS</i> AT A MINIMUM PRECLUDE ANY AWARD OF RELIEF TO PRE- <i>MANHART</i> RETIRES, AND THUS THE AWARD OF OF RELIEF TO THE PRE- <i>MANHART</i> RE- TIREES IN THIS CASE MUST BE SET ASIDE. ....	39
II(B). ALTERNATIVELY, THE AWARD OF RE- LIEF TO THE POST- <i>MANHART</i> PORTION OF THE PLAINTIFF CLASS HEREIN MUST BE PRORATED TO REFLECT ON- LY THOSE BENEFITS ATTRIBUTABLE TO CONTRIBUTIONS COLLECTED, OR BENEFITS ACCRUED, AFTER THE AP- PROPRIATE LIABILITY CUT-OFF DATE. ....	41
II(C). ALTERNATIVELY, 42 U.S.C. § 2000e-5(g)'s TWO-YEAR LIABILITY CUT-OFF DATE MUST BE FIXED IN THIS CASE AT OC- TOBER 7, 1979—TWO YEARS BEFORE PLAINTIFF LONG'S OCTOBER 7, 1981 EEOC CHARGE OF DISCRIMINATION— AND THE PLAINTIFF CLASS LIMITED TO THOSE PERSONS WHO RETIRED NO MORE THAN 300 DAYS PRIOR TO THE JULY 2, 1982 FILING OF THE INITIAL CLASS ACTION COMPLAINT IN THIS CAUSE (OR, AT BEST, TO THOSE PER- SONS WHO RETIRED NO MORE THAN 300 DAYS PRIOR TO PLAINTIFF LONG'S OCTOBER 7, 1981 EEOC CHARGE). ....	43
CONCLUSION .....	48

## TABLE OF AUTHORITIES

CASES	Page
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) —	37
<i>Allen v. Wright</i> , 468 U.S. 737 (1984) —	38
<i>Arizona Governing Committee for Tax Deferred Annuity &amp; Deferred Compensation Plans v. Norris</i> , 463 U.S. 1073 (1983) ("Norris") —	passim
<i>Bazemore v. Friday</i> , 478 U.S. —, 92 L.Ed.2d 315 (1986) —	20, 44, 45
<i>Chardon v. Fernandez</i> , 454 U.S. 6 (1981) —	21, 45
<i>City of Los Angeles, Dep't of Water &amp; Power v. Manhart</i> , 435 U.S. 702 (1978) ("Manhart") —	passim
<i>Crown, Cork &amp; Seal Co. v. Parker</i> , 462 U.S. 345 (1983) —	21, 46, 47
<i>Delaware State College v. Ricks</i> , 449 U.S. 250 (1980) —	21, 45, 46
<i>EEOC v. Colby College</i> , 589 F.2d 1139 (1st Cir. 1978)	28, 29
<i>Green v. Mansour</i> , 474 U.S. —, 88 L.Ed.2d 371 (1985) —	37
<i>Hannahs v. N.Y. State Teachers' Retirement System</i> , No. 78 Civ. 2541-CSH (S.D. N.Y., filed March 9, 1987), earlier decision, 26 F.E.P. Cases 527 (S.D. N.Y. 1981), appeal pending —	23, 45
<i>Long v. State of Florida</i> , 805 F.2d 1542 (11th Cir. 1986), cert. pending —	passim
<i>Payne v. Travenol Laboratories, Inc.</i> , 673 F.2d 798 (5th Cir.), cert. denied, 459 U.S. 1038 (1982) —	47
<i>Probe v. State Teacher' Retirement System</i> , 780 F.2d 776 (9th Cir.), cert. denied, — U.S. —, 90 L.Ed.2d 978 (1986) ("Probe") —	passim
<i>Retired Public Employees' Ass'n of California v. State of California</i> , 799 F.2d 511 (9th Cir. 1986), rev'g, 614 F.Supp. 571 (N.D. Cal. 1984) ("Retired Public Employees") —	i, 19, 22, 40, 41

## TABLE OF AUTHORITIES (Cont'd)

	Page
<i>Simon v Eastern Kentucky Welfare Rights Organization</i> , 426 U.S. 26 (1976) —	38
<i>Sobel v. Yeshiva University</i> , 566 F.Supp. 1166 (S.D. N.Y. 1983), rev'd, 797 F.2d 1478 (2d Cir. 1986), later decision, 656 F.Supp. 587 (S.D. N.Y. 1987) —	29
<i>Spirt v. Teachers' Ins. &amp; Annuity Ass'n</i> , 735 F.2d 23 (2d Cir.), cert. denied, 469 U.S. 881 (1984) ("Spirt II") —	4, 19, 22, 35, 36, 37
<i>United Air Lines, Inc. v Evans</i> , 431 U.S. 553 (1977) —	46
CONSTITUTIONS	
U.S. Const., Art. III —	6, 19, 38
Fla. Const., Art. III, § 3(b) —	12
Fla. Const., Art. III, § 3(d) —	12
Fla. Const., Art. X, § 14 —	11
STATUTES	
Equal Pay Act of 1963 —	35
Title VII, Civil Rights Act of 1964 —	passim
Title IX, Education Amendments of 1972 —	15, 16
Sections 703 & 706, Title VII, Civil Rights Act of 1964 —	3
28 U.S.C. § 1254(1) —	2
28 U.S.C. § 1291 —	2
28 U.S.C. § 1292(a)(1) —	2
28 U.S.C. § 1343 —	2
42 U.S.C. § 1983 —	1, 2
42 U.S.C. § 2000e-2(a)(1) —	1, 3



## TABLE OF AUTHORITIES (Cont'd)

	Page
42 U.S.C. § 2000e-5(e) .....	1, 3, 44
42 U.S.C. § 2000e-5(g) .....	1, 3, 7, 8, 21, 43, 46
78 Stat. 255 .....	3
78 Stat. 259 .....	3
86 Stat. 104 .....	3
86 Stat. 109 .....	3
Ch. 86-137, §§ 2 & 3, <i>Laws of Fla.</i> (1986) .....	3, 4, 12, 13
<i>Fla.Stat.</i> § 112.66(9) (1979) .....	29
<i>Fla.Stat.</i> § 112.66(9) (1985) .....	3, 4
<i>Fla.Stat.</i> § 121.052(4) .....	11
<i>Fla.Stat.</i> § 121.061 (1985) .....	4
<i>Fla.Stat.</i> § 121.071 (1985) .....	4
<i>Fla.Stat.</i> § 121.071(2) .....	11
<i>Fla.Stat.</i> § 121.091(1) (1985) .....	4
<i>Fla.Stat.</i> § 121.091(6) (1985) .....	4
REGULATIONS	
45 C.F.R. § 86.56(b)(2) (1979) .....	16
43 <i>Fed.Reg.</i> 39775 (1978) .....	44
RULES OF PROCEDURE	
<i>Fed.R.App.P.</i> 43(c)(1) .....	iii
<i>Fed.R.Civ.P.</i> 25(d)(1) .....	iii
Sup. Ct. R. 34.5 .....	xiv
OTHER AUTHORITIES	
Annot., <i>Standing—Article III Requirements</i> , 70 L. Ed.2d 941 (1983) .....	38

## TABLE OF AUTHORITIES (Cont'd)

	Page
Bernstein, <i>The Havoc in Retirement Benefits after Norris</i> , 70 A.B.A. Journal 80 (Feb. 1984) .....	23, 24
Benston, <i>Discrimination &amp; Economic Efficiency in Employee Fringe Benefits: A Clarification of Issues &amp; A Response to Professors Brilmayer, Laycock &amp; Sullivan</i> , 50 U. Chi. L. Rev. 250 (1983) .....	28
Benston, <i>The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Re- visited</i> , 49 U. Chi. L. Rev. 489 (1982) .....	28
Brilmayer, Hekeler, Laycock & Sullivan, <i>Sex-Dis- crimination in Employer-Sponsored Insurance Plans: A Legal &amp; Demographic Analysis</i> , 47 U. Chi. L. Rev. 505 (1980) .....	28
Brilmayer, Laycock & Sullivan, <i>The Efficient Use of Group Averages as Nondiscrimination: A Re- joinder to Professor Benston</i> , 50 U. Chi. L. Rev. 222 (1983) .....	28
Genthner, <i>Arizona v. Norris: Supreme Court Death Knell for Sex Segregated Mortality Tables</i> , 52 Ins. Counsel Journal 295 (April 1985) .....	27
Hager & Zempleman, <i>The Norris Decision, Its Implications &amp; Applications</i> , 32 Drake L. Rev. 913 (1983) .....	23, 27, 32, 42
Note, <i>Norris v. Arizona: A Move Toward Unisex Insurance</i> , 45 U. La. L. Rev. 149 (Spring 1984) .....	25
Note, <i>Sex-Based Actuarial Assumptions, Title VII &amp; The Equal Pay Act: Employee Fringe Benefit Planning Following Manhart &amp; Norris</i> , 36 Rut- gers L. Rev. 839 (Spring 1984) .....	24
U.S. Dep't of Labor, <i>Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits</i> (1983) ("DOL Cost Study") .....	24, 25, 33

## PREFACE REGARDING PARTY & RECORD REFERENCES

Respondents herein were plaintiffs in the trial court. Accordingly, for ease of reference they will be referred to here throughout simply as "plaintiffs." Should it be necessary to refer to any one of them individually, he will be referred to by the word "plaintiff" followed by his last name, e.g., "plaintiff Long." Similarly, the noticed pre-August 1, 1983 retiree subclass herein (subclass "A") will be referred to herethroughout as the "class" or the "plaintiff class." Should it be necessary to refer to any one of them individually, he will be referred to by the words "class member" followed by his last name, e.g., "class member Samaha."

Further, should it be necessary to refer to the unnoticed subclass of persons retiring on or after August 1, 1983 (subclass "B"),<sup>4</sup> they will be referred to as the "post-August 1, 1983 retirees."

Petitioners herein were defendants in the trial court. They will be referred to herethroughout simply as "the State" or as "defendants." Should it be necessary to refer to any one of them individually, he or she will be referred to by name or title, e.g., "defendant Smith" or "Secretary Smith."<sup>5</sup>

Items or matters in the joint appendix will be cited as "J.A." followed by a page number, e.g., "J.A. 55." Items in the separately printed appendix to the petition

<sup>4</sup>See n.3 *supra* at p. iv.

<sup>5</sup>See n.2 *supra* at p. iii.

for certiorari, if not reprinted in the joint appendix, will be referred to by "Pet.App." followed by the petition appendix page number, e.g., "Pet.App. A93."

Further, should it be necessary to refer to transcripts or portions thereof which are not reproduced in the joint appendix, such will be referred to by "R" followed by a two-number cite—the first number which refers to the 11th Circuit record-on-appeal volume number, and the second number which refers to the specific transcript page number(s) where the testimony appears. By way of example, the citation to the direct testimony of defendants' actuarial expert (Michael J. Tierney) during the February 1986 four-day final hearing in this cause would be "R19-100 to 180."<sup>6</sup>

Similarly, should it be necessary to refer to documents in the record on appeal which are not reproduced in the joint or petition appendices, such will be referred to by "R" followed by a three-number cite—the first number which again refers to the 11th Circuit record-on-appeal volume number, the second number which refers to the actual district court document number of the document, and the third number which refers to the page number(s) (counting down from the top) at which the particular matter appears. By way of example, the citation to plaintiffs'

<sup>6</sup>For the sake of consistency, this is the same citation format that was used in the certiorari petition in this matter, which citation format was previously described at pp. xi-xii in that petition. Likewise, the same citation format was used in the State's "Brief in Opposition to Cross-Petition for Writ of Certiorari" in Sup.Ct. Case No. 86-1852, as to which cross-petition case review was denied on October 5, 1987.

amended complaint upon which this matter proceeded would be "R4-55-3 to 11."<sup>7</sup>

Finally, exhibits admitted at the February 1986 final hearing will be clearly identified as plaintiffs' or defendants', e.g., "P.Ex." or "D.Ex.", followed where appropriate by a page number or numbers (counting down from the top). At least on an initial exhibit reference this Court's Rule 34.5 will be strictly adhered to, though shortened reference solely to the exhibit number may subsequently be made where clarity will not suffer. Thus, and by way of example, the initial reference to intervening plaintiff Carl Rassler's EEOC administrative material would be "D.Ex. 31-1 to 11, R19-28 & 29," with any subsequent references possibly just to the exhibit. If the exhibit has been reproduced in the joint appendix, such will be duly indicated.

<sup>7</sup>See n.6 *supra* at p. xiii.

No. 86-1685

---

In The  
**Supreme Court of the United States**  
October Term, 1987

---

STATE OF FLORIDA, *et al.*,  
*Petitioners,*  
v.  
HUGHLAN LONG, *et al.*,  
*Respondents.*

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

BRIEF FOR PETITIONERS

---

OPINIONS BELOW

The decision of the 11th Circuit (J.A. 249-271) is reported at 805 F.2d 1542. The judgment of the district court (Pet.App. A33-A34), that judgment's underlying order (Pet.App. A35-A36), and the two orders of March 31, 1986, and March 16, 1984, incorporated therein (respectively, Pet. App. A37-A70 & A71-A83) are not reported.

---

JURISDICTION

Plaintiffs initially sought relief under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), 42 U.S.C. § 1983, and pendent state law claims. They in-



voked the district court's 28 U.S.C. § 1343 and pendent state claim jurisdiction. On March 16, 1984, the district court granted defendants partial summary judgment and dismissed plaintiffs' § 1983 and pendent state law claims (respectively, Pet.App. A74-A75, ¶ 7, & A74, ¶ 6). That dismissal was never subsequently appealed to the 11th Circuit, and thereafter this case proceeded solely on plaintiffs' Title VII claims.

Following the district court's March 31, 1986 order (Pet.App. A37-A70), defendants timely invoked the 11th Circuit's jurisdiction under 28 U.S.C. § 1292(a)(1), and plaintiffs subsequently cross-appealed. Following the district court's May 29, 1986 judgment (Pet.App. A33-A34), defendants timely invoked the 11th Circuit's jurisdiction under 28 U.S.C. § 1291, and plaintiffs subsequently cross-appealed. On July 7, 1986, acting on defendants' emergency motion for stay pending appeal, the 11th Circuit granted the requested stay, consolidated the appeals, and expedited this case (Pet.App. A33).

The 11th Circuit rendered its decision on December 19, 1986 (805 F.2d 1542; J.A. 249), and denied plaintiffs' petition for rehearing on February 19, 1987 (805 F.2d 1552; J.A. 271; Pet.App. A25-A26). The petition for writ of certiorari was filed April 21, 1987, and was granted on October 5, 1987, limited to Questions 1, 2(A), 2(B) and 2(C).<sup>8</sup> The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

<sup>8</sup>Plaintiffs filed a cross-petition for writ of certiorari on May 19, 1987 (Sup.Ct. Case No. 86-1852), as to which review was denied on October 5, 1987.

## STATUTES INVOLVED

This case involves §§ 703 & 706 of Title VII of the Civil Rights Act of 1964 as amended [78 Stat. 255 & 86 Stat. 109; 78 Stat. 259 & 86 Stat. 104]—42 U.S.C. § 2000e-2(a)(1) and 42 U.S.C. §§ 2000e-5(e) & (g). It also involves *Fla. Stat.* § 112.66(9) relating in general to the operation of Florida government pension plans, and selected provisions of Chapter 121, Florida Statutes, relating to the operation and administration of the Florida Retirement System ("FRS"), as well as §§ 2 & 3 of Chapter 86-137, Laws of Florida (1986), whereby the 1986 Florida Legislature amended the FRS contribution rates effective October 1, 1986.

42 U.S.C. § 2000e-2(a)(1) provides in relevant part:

(a) *Employers.* It shall be an unlawful employment practice for an employer—

(1) . . . to discriminate against any individual with respect to his compensation . . . or privileges of employment, because of such individual's . . . sex . . . .

42 U.S.C. § 2000e-5(e) provides in relevant part:

(e) *Time for filing charges.* A charge under this section . . . shall be served upon the person against whom such charge is made within ten days thereafter . . . [and] such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred . . . .

42 U.S.C. § 2000e-5(g) provides in relevant part:

(g) *Injunctions; affirmative action; equitable relief.* If the court finds that the respondent has intentionally engaged in or is engaging in an unlawful employment practice charged in the complaint, the

court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, . . . back pay . . . , or any other relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. . . .

*Fla.Stat.* § 112.66(9) is set forth in the separately printed appendix to the petition for certiorari ("Pet. App.") at A128. *Fla.Stat.* 121.061 is set forth in the Pet.App. at A129-A130; § 121.071 at Pet.App. A131-A134; § 121.091(1) at Pet.App. A135-A136; and § 121.091(6) at Pet.App. A137-A139. Sections 2 & 3 of Chapter 86-137, Laws of Florida (1986), are set forth in the Pet.App. at A140-A147.

## STATEMENT OF THE CASE<sup>9</sup>

### I. Proceedings Below

The initial portion of the 11th Circuit's opinion before Part I, 805 F.2d at 1544-45 (J.A. 254-255), accurately summarizes the proceedings below as to the relief ordered and affirmed in this case. In sum, that relief amounted to an award of approximately \$43.6 million in additional pension benefits to the plaintiff class (i.e., those persons who retired prior to August 1, 1983, and after March 24,

<sup>9</sup>The Court should note that because of this case the State of Florida filed an amicus brief on the merits in *Norris* (Sup.Ct. #82-52) and an amicus brief in support of the petition for writ of certiorari in *Teachers' Insurance & Annuity Ass'n v. Spirt* (Sup.Ct. #84-50). The Court may find an examination of those amicus briefs helpful to its understanding of the instant case.

1972)—(1) approximately \$32.3 million in present day dollars in prospective adjustment of pension benefits (with an effective commencement date of April 30, 1986) to the entire class; (2) approximately \$11.3 million in retrospective adjustment of pension benefits (for the period between April 30, 1986, and October 1, 1978) to that portion of the class who retired subsequent to October 1, 1978, and prior to August 1, 1983.

In affirming this award of relief, 805 F.2d at 1548-51 (J.A. 263-269), the 11th Circuit specifically disagreed and conflicted with, 805 F.2d at 1548 (J.A. 262), the 9th Circuit's decision in *Probe v. State Teachers' Retirement System*, 780 F.2d 776 (9th Cir.), *cert. denied*, — U.S. —, 90 L.Ed.2d 978 (1986). In addition, it rejected plaintiffs' "bad faith" argument, 805 F.2d at 1550 & 1552 (J.A. 267-268 & 271), as well as their arguments that the relief ordered should have been topped up beyond the unisex level, 805 F.2d at 1551 (J.A. 269-270), and that the pre-*Manhart* portion of the plaintiff class herein<sup>10</sup> should have been awarded retrospective adjustment of pension benefits in addition to the prospective adjustment of benefits which they were awarded, 805 F.2d at 1551 (J.A. 269). These arguments have now also been rejected by this Court (*see* Sup.Ct. Case No. 86-1852, review denied October 5, 1987).

Similarly, the 11th Circuit explicitly rejected the State's alternative class limitation and proration arguments, 805 F.2d at 1546 & 1551 (J.A. 258-259 & 270), and, by affirming the award of relief to the pre-*Manhart* retirees herein,<sup>11</sup> implicitly rejected the State's alternative

<sup>10</sup>See n.12 *infra* at p. 7.

<sup>11</sup>Again see n.12 *infra* at p. 7.

argument that no relief of any kind should have been awarded to said retirees. These are the three alternative Questions 2(A), 2(B), and 2(C) on which this Court has granted review (*see* this Brief *supra* at pp. i-ii).

Continuing, there are several additional matters not readily apparent from the 11th Circuit's decision (J.A. 249-271) which are important in the context of this brief.

First, in urging *Norris* barred the award of relief in this case to plaintiffs and the plaintiff class (*see* Question (1) herein *supra* at p.i), the State presented such in the context of lack of Article III jurisdiction. Specifically the State urged that, because *Norris* barred the award of relief to plaintiffs and the plaintiff class, they had no redressable injury and thus Article III jurisdiction was lacking over their claims (*see* R5-2662-1 and R5-2663-1 & 6 to 14; *see also* R4-89-1 to 6). In its March 16, 1984 order the district court found *Norris* did not preclude the award of relief in this case (Pet.App. A77-A83, ¶ 12), and this explains its denial in that same order of the State's motion to dismiss for lack of Article III jurisdiction (Pet.App. A75, ¶ 8), as well as its grant in that order of partial summary judgment to plaintiffs on their Title VII claims in the form of declaratory relief only on the issue of liability (Pet.App. A76, ¶ 11).

This issue was also presented to the 11th Circuit in the context of lack of Article III jurisdiction, and Question (1) herein, *supra* at p.i, likewise encompasses this same lack of redressable injury Article III consideration.

Second, the importance of the October 1, 1978 cut-off date must be underscored. For the purposes of this case

it is the unchallenged pre-/post-*Manhart* compliance date, *see* 805 F.2d at 1549 n.7 (J.A. 265 n.7). In its March 31, 1986 order following the February 1986 four-day final hearing in this matter (Pet.App. A37-A70) the district court held October 1, 1978, was the date by which the State reasonably could have complied with this Court's April 1978 decision in *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) ("*Manhart*") (*see* Pet.App. at A66), and this October 1, 1978 *Manhart* compliance date was unchallenged in the 11th Circuit, except that the State maintained at both the trial and appellate levels there should be a later liability cut-off date because of the two-year requirement of 42 U.S.C. § 2000e-5(g) (*see, e.g.*, J.A. 30, ¶ 47).<sup>12</sup>

Third, the State raised in the district court the failure of plaintiff Haas, intervening plaintiff Ressler, and class-member Samaha to satisfy the administrative exhaustion requirements of Title VII (*see, e.g.*, Pet.App. at A99-A100; at A119-A120, ¶¶ 10-11; at A122-A123, ¶¶ 12-14; & at A124-A126, ¶¶ 23-36; *see also, e.g.*, J.A. 29, ¶ 45; R4-89-18 to 20; R5-2663-2 & 22 to 25; R10-2795-19; R10-2818-11 to 13; R13-2888-12 to 16, & 9 to 12 at ¶¶ 34-43; *see also, e.g.*, R18-72 to 73; R21-149 & 151 to 155). Only as to plaintiff Long was it agreed he had exhausted the administrative prerequisites

<sup>12</sup>Accordingly, the reference "pre-*Manhart* retirees" herein refers to that portion of the plaintiff class who retired prior to October 1, 1978 (and after March 24, 1972). Under the structure of the district court's judgment (Pet.App. A33-A34) and order (Pet.App. A35-A36), these pre-*Manhart* retirees were awarded only prospective adjustment of pension benefits. Thus, the post-*Manhart* portion of the plaintiff class (those persons who retired after October 1, 1978, and before August 1, 1983) were awarded both prospective and retrospective adjustment of pension benefits.



for bringing a Title VII action in federal court (*see, e.g.*, R4-57-1, ¶ 3, *in conjunction with*, transcript of 6/2/83 motion hearing—R14-73, lines 16-21, & 16, lines 14-18). By this Court's denial of review on Question 3 in the State's petition for certiorari, regarding the collateral estoppel/*res judicata* issue vis-a-vis plaintiff Long, it is now settled for the purposes of this case that plaintiff Long is properly in federal court with Title VII administrative remedies duly exhausted.

However, the exhaustion issues remain with respect to plaintiff Haas, intervening plaintiff Rassler, and class-member Samaha. They were presented in the 11th Circuit and are relevant to alternative Question 2(C) herein as to whether only plaintiff Long's October 7, 1981 Title VII EEOC charge of discrimination must be looked to for the purposes of 42 U.S.C. § 2000e-5(g)'s two-year liability cut-off date.

## II. Facts Re Florida Retirement System

The Florida Retirement System ("FRS") was created in 1970 out of the amalgamation of several earlier Florida retirement plans (Pet.App. A107, ¶ 31, & A44, ¶ 31), one of which at least can be traced to the 1930's (J.A. 132). It is a defined benefit pension plan (J.A. 92; Pet.App. A102, ¶ 5, & A39, ¶ 5) with over 1,100 Florida local governments participating therein as well as the State and its agencies (Pet.App. A106, ¶¶ 28-29, & A43, ¶¶ 28-29), plus the faculty and staff of the State university system (J.A. 54). Of those 1,100 participating governments, the employees of Florida's 67 local school boards make up 45% of the FRS membership, or about 175,000

people out of the approximately 418,000 current active employee members of the system (J.A. 53 & 57-60). As of February 1986 (the time of the final hearing), it had in excess of 84,000 retired members (J.A. 53).

It has three classes of active membership—Regular, Special Risk, and Elected State Officers—of which the regular class constitutes about 95% of the total employee membership (J.A. 54-55). Up to 1975 the FRS was funded by both employee and employer contributions; from 1975 to present the FRS has been funded solely by employer contributions for the regular and special risk, but not elected state officers, classes (Pet.App. A106, ¶ 27, & A107 ¶ 32; Pet.App. A43, ¶ 27, & A44, ¶ 32). However, all persons who retired under the FRS through 1983 (i.e., plaintiffs and the plaintiff class) had personal contributions in the fund (J.A. 132-133).

Moreover, and most important to underscore, is that all retirees under the FRS obtain a vested contractual right to the full amount of their retirement benefits, which arises as of date of retirement and which prevents the State from thereafter ever subsequently reducing the same (*see* Pet.App. A102, ¶ 7, & A109, ¶¶ 40-41; Pet.App. A39, ¶ 7, & A46, ¶¶ 40-41; *see also* J.A. 87). In relation to this, and likewise important to note, is that each person who is about to retire under the FRS actually receives copies of the calculations of his or her future monthly retirement benefits (Pet.App. A109, ¶¶ 40-41, & A46, ¶¶ 40-41).

From its inception in 1970 to present the FRS has always been funded by equal contributions made by or on behalf of similarly situated males and females (Pet.App.

A107, ¶ 33, & A44, ¶ 133). Also from 1970 to present, under its first and primary single life benefit option, the FRS has always paid the same monthly retirement benefit to similarly situated males and females (Pet.App. A107-A108, ¶ 35, & A44-A45, ¶ 35; R19-44).

From its inception to present the FRS has had four (4) retirement benefit options—the first being its primary and single life option; the remaining three being joint-annuitant options (Pet.App. A107-A108, ¶¶ 34-38, & A44-A45, ¶¶ 34-38; J.A. 55-57). As for the three joint-annuitant options, prior to August 1, 1983, the FRS calculated benefits thereunder using sex-distinct mortality tables which resulted in lower monthly retirement benefits to males retiring before said date (specifically, plaintiffs and the plaintiff class), and electing benefits under any one of said three options, as contrasted with similarly situated females (Pet.App. A108, ¶¶ 36-38, & A102, ¶ 6; Pet.App. A45, ¶¶ 36-38, & A39, ¶ 6).

However, effective August 1, 1983, the State adopted unisex mortality tables for the calculation of retirement benefits under its three joint-annuitant options for all persons retiring on or after that date (see Pet.App. A105, ¶ 25, in conjunction with, A108, ¶¶ 36-38, & Pet.App. A42-A43, ¶ 25, in conjunction with, A45, ¶¶ 36-38; see also J.A. 182-183—D.Ex. 27, R19-21 & 32), which tables have produced and do produce an equal monthly benefit for similarly males and females retiring since that time (Pet.App. A53, ¶ 44, & A117, ¶ 1). This Court's *Norris* decision was the reason the State changed (J.A. 76-77; J.A. 182-183—D.Ex. 27); this lawsuit had nothing to do with it (J.A. 44 & 76-77). Indeed, because of this the post-August 1, 1983

retirees (subclass "B") are not before this Court (see n.3 herein *supra* at p. iv).

To change, it should also be emphasized that the FRS is funded solely by contributions calculated as a percentage of employee payroll (see J.A. 60; see also *Fla. Stat.* § 121.052(4) (Pet.App. A140-144) & § 121.071(2) (Pet.App. A131-A132 & A145-A146)).<sup>13</sup> It is constitutionally mandated under *Fla. Const.* Art. X, § 14, that sufficient contributions be collected to cover all promised benefits to maintain the FRS "on a sound actuarial basis" (see J.A. 61; see also Pet.App. A105, ¶ 22, & A42, ¶ 22). In other words, the FRS is an advanced funding plan, not a "pay-as-you-go" plan like Social Security (see J.A. 103; see also J.A. 61).<sup>14</sup>

In relation to this, the level of needed contributions for the FRS is determined biennially by the Florida Legislature, based upon the State's consulting actuaries' actuarial reviews (e.g., J.A. 60). These biennial reviews assess assumptions from the previous two-year review period versus subsequent actual experience to determine what contribution rate is required to keep the FRS in

<sup>13</sup>As with any retirement plan, those contributions (following collection and receipt) are then invested and produce investment income (see, e.g., D.Ex. 32, R19-86 & 89, & D.Ex. 34, R19-180; see also, e.g., D.Exs. 21 to 26, R19-20 & 21).

<sup>14</sup>The FRS is a new or youthful retirement system with, accordingly, a large unfunded liability and a resultant large positive cash flow (e.g., J.A. 49-50 & 142-143). Indeed, the unfunded liability (UAAL—Unfunded Actuarial Accrued Liability) has grown every year and is expected to top out at about \$9.0 billion in 1995 (e.g., J.A. 64-68; J.A. 196-201—P.Ex.13, R21-111 & 112) with the result that a significant portion of the contributions collected go to pay off this unfunded liability (e.g., J.A. 72-73).

actuarial balance (*compare, e.g.,* D.Exs. 32 & 34, respectively, R19-86 & 89 & R19-180; *see also* J.A. 101-103; *see generally* R19-119 to 146).

Also in relation to this, the 1984 Legislature adopted an increase in contribution rates which was 24 basis points (.24%) over that recommended by the State's consulting actuaries in their 1983 FRS Actuarial Review as necessary in their opinion to keep the FRS in actuarial balance (*see* Pet.App. A104-105, ¶¶ 19-20, & A41-A42, ¶¶ 19-20; *see also* J.A. 68-69). This increase resulted from legislative compromise arising from the Florida Auditor General's criticisms (D.Ex. 12, R18-99 & 109) of the consulting actuaries' 1983 Actuarial Review and (D.Ex. 32, R19-86 & 89) and his concern with the increase in the FRS' unfunded liabilities to over \$6.4 billion in 1984—with a projection to a top of about \$9.0 billion in 1995 (*e.g.,* J.A. 63-69).<sup>15</sup> The additional 24 basis points increase had nothing to do with this lawsuit (J.A. 43-44, 67-68, & 71), and would for certain only last until the 1986 session of the Florida Legislature when it was presented with the consulting actuaries' 1985 FRS Actuarial Review—both of which were to occur in the Spring of 1986 following the February 1986 final hearing in this matter (J.A. 70).<sup>16</sup> Further, the moneys

<sup>15</sup>See n.14 *supra* at p. 11.

<sup>16</sup>And such, indeed, occurred. Following receipt of the State's consulting actuaries' 1985 Actuarial Review the 1986 Florida Legislature, which met in April and May 1986 (*see Fla. Const. Art. III, §§ 3(b) & 3(d)*), enacted entirely new contribution rates effective October 1, 1986. *See* §§ 2 & 3 of Chapter 86-137, Laws of Florida (1986) (Pet.App. A140-A147); *see also* ¶¶ 2-3, 5-7, & 10-14 of Affidavit of Andrew J. McMullian, III, filed in

(Continued on following page)

generated by the additional 24 basis points were applied to the unfunded liability; they were not segregated or placed into any separate fund or account (J.A. 43, 69-70, & 104-105).

With respect to this 1984 additional 24 basis point increase, the 11th Circuit erred when it stated, 805 F.2d at 1550-51 (J.A. 268):

The district court found that the Florida legislature increased the system's contribution rates in 1984, creating a surplus in the fund of over \$200 million. This finding of fact, based primarily on the testimony of the FRS consulting actuary, is supported by sufficient evidence and is not clearly erroneous.

In point of fact, nowhere did the district court find the surplus (if any) created by this additional 24 basis points increase was "over \$200 million" (*see specifically* Pet. App. A67-A68; *see generally* Pet.App. A53-A70). Indeed, the unrebutted and uncontradicted testimony of the State's consulting actuary and testifying actuarial expert, Michael J. Tierney (J.A. 90-91), was that a one basis point increase in the FRS contribution rate generates only about \$700 to \$800 thousand per year (J.A. 131). Thus, simple arithmetic calculation establishes that the 1984 Legislature's

(Continued from previous page)

the 11th Circuit on June 27, 1986, in support of the State's emergency motion for stay pending appeal. In § 3 of Chapter 86-137 the Legislature increased the regular class contribution rates 90 basis points from 12.24 to 13.14% of gross payroll (*see* Pet.App. A145-A146). Likewise, in both §§ 2 & 3 the contribution rates for the other two FRS classes (and divisions thereof) were increased in various amounts (Pet.App. A140-A144 & A146), except for the judicial division of the elected state officers class whose contribution rate was reduced 85 basis points from 21.79 to 20.94% of gross payroll (Pet.App. A142-A143).



additional 24 basis points increase generated only about \$33.6 to \$38.4 million for the two years it was in effect until the 1986 Legislature again amended the FRS contribution rates (*see* n.16 herein *supra* at p. 12). Furthermore, and as mentioned above, the moneys generated were applied to pay off the unfunded liability (*again see* J.A. 43, 69-70, & 104-105; *see also* n.14 herein *supra* at p. 11).<sup>17</sup>

In addition, and highly important to note, is that again the unrebutted testimony of the State's actuarial expert established that in a defined benefit plan, especially one such as the FRS which is funded entirely by contributions, there is a direct connection between contributions and benefits just as in a defined contribution plan—the only difference being that in a defined benefit plan the level of the benefit determines the amount of the contribution, while in a defined contribution plan the level of the contribution determines the amount of the benefit (*see specifically* J.A. 92-93, 95, & 100; *see generally* J.A. 91-99). Further, at and after an individual's retirement both types of plans become exactly identical (J.A. 95-96).

Moreover, proration calculations (i.e., the allocation of benefits to before and after a date certain), using the

<sup>17</sup>Additionally, and from subsequently occurring facts not yet in existence and thus unbeknownst at the time of the February 1986 final hearing, the 1986 Legislature increased the FRS contribution rates because the most recent FRS biennial actuarial review completed on April 2, 1986, subsequent to both the February 1986 final hearing as well as the district court's March 31, 1986 order (Pet.App. A37-A70), established that even with the 1984 Legislature's additional 24 basis point increase, such was not sufficient to keep the FRS in actuarial balance (*see* ¶¶ 2-3, 5-7 & 10-14 of Affidavit of Andrew J. McMullian, III, attached to "Appellants' Notice of Filing Affidavits" filed in the 11th Circuit on June 27, 1986, in support of the State's emergency motion for stay pending appeal).

April 1978 date of *Manhart*, were performed in this case under both "contribution" and "accrued benefit" methodologies for each of the levels of monetary relief contemplated by the district court (*see* Pet.App. A113-A117 & A50-A53, *in conjunction with*, Pet.App. A90, ¶ C). Those calculations were done by Michael Tierney, the State's actuarial expert (*see* J.A. 106-108; *see also* R20-42 to 43).

It is also important to note there is no dispute that the award in this case would be paid by the FRS (the plan) or its 1,100 plus participating Florida governmental employers through increased contribution rates (*see* Pet.App. A68; *see also, e.g.*, J.A. 71-72, 73-74, 75, & 104-106; *cf.* J.A. 101-103). Such will principally impact the FRS participating local government employers (including county school boards) who can ill afford any additional financial burden, as they are in or soon heading for serious financial difficulty (*see, e.g.*, J.A. 135-139; *see also, e.g.*, R19-8 to 9 & 12 to 15). As for the detailed specifics, *see generally* direct testimony of defendants' expert Dr. McClave (R20-55 to 101), *in conjunction with* D.Ex. 37 (R20-56 & 101).

Finally, the Court should note that the conflict among federal regulations which it referenced in *Manhart, supra* 435 U.S. at 720 n.37 & 714 n.26, became a reality in this case with respect to the FRS. Specifically, in October and November of 1978 two charges were filed with the civil rights division of the then U.S. Department of Health, Education & Welfare ("HEW") asserting the FRS, in the payment of its optional joint-annuitant retirement benefits, discriminated against males under Title IX of the Education Amendments of 1972 (*see* J.A. 165 & 166—D.Exs. 1 & 2,

R18-81 & 109; *see also* J.A. 35-37). Those charges were apparently filed by employees of or retirees from the Pinellas County School Board and specifically asserted that, because of the application of sex-based actuarial factors in the calculation of the FRS' optional joint-annuitant benefits which resulted in males receiving smaller monthly retirement benefits than similarly situated females, males suffered unlawful discrimination under Title IX (J.A. 170-171—D.Ex. 5, R18-84 & 109).

In November 1978 HEW found under 45 C.F.R. § 86.56(b)(2) of its Title IX regulations that, because the FRS exacted equal contributions from or on behalf of similarly situated males and females, the State did not discriminate in its payment of lower optional joint-annuitant benefits to males as contrasted with similarly situated females (J.A. 170-171—D.Ex. 5). The State interpreted this to mean that they could "go on and proceed what they were doing"—that at least for the purposes of Title IX its use of sex-based mortality tables in the calculation of the FRS' joint-annuitant retirement benefits "was not discriminatory" (J.A. 37).

### III. Facts Re Plaintiffs

Plaintiff Long retired as of July 1982 under FRS joint-annuitant Option II (J.A. 77-78). His previous employer was the State's Department of Labor & Employment Security (J.A. 78), and his only EEOC charge of discrimination was filed October 7, 1981 (*see* J.A. 78-79; *see also* D.Ex. 29-3, R19-28 & 29). That charge named as respondent the State of Florida, Department of Administration, Division of Retirement (J.A. 79; D.Ex. 29-3), and

was transmitted thereto by the EEOC on December 2, 1981 (D.Ex. 29-2).

Plaintiff Haas retired effective March 1, 1981, under FRS joint-annuitant Option III (J.A. 79-80) from Metropolitan Dade County (J.A. 80). He never filed a charge of discrimination (*see* J.A. 80; *see also* R5-2663-48 & 49, Exhibits "C" & "D").

Intervening plaintiff Rassler retired effective January 1, 1979, under FRS joint-annuitant Option II from the Hillsborough County School Board (J.A. 80). Over a year and five months later he filed his initial EEOC charge against the school board on May 15, 1980 (R8-2737-6 & 9), though the State has no record of it (*see* J.A. 80-81; *see generally* D.Ex. 31, R19-28 & 29; *see also* J.A. 79). Indeed, the first charge of which the State was aware was Mr. Rassler's amended charge of August 24, 1981 (J.A. 80-81; D.Ex. 31-6, R19-28 & 29). That amended charge named as respondent the State of Florida, Department of Administration, Division of Retirement (D.Ex. 31-6) and was transmitted thereto by the EEOC on October 1, 1981 (D.Ex. 31-3).

Class member Louis Samaha retired on January 29, 1979 (*e.g.*, D.Ex. 30-11 & 12, R19-28 & 29; P.Ex. 27, R21-111 & 112; R8-2740-3), under FRS joint annuitant Option III effective February 1979 (J.A. 81) from the Pinellas County School Board (J.A. 81; P.Ex. 27, R21-111 & 112). Three hundred thirty-two (332) days later he filed his initial charge of discrimination against the school board on December 27, 1979 (P.Ex. 27, R21-111 & 112; R8-2740-3), though the State has no record of it (*see* J.A. 80-81; *see generally* D.Ex. 30, R19-28 & 29; *see also* J.A. 79). In-

deed, the first charge of which the State was aware was Mr. Samaha's amended charge of August 25, 1981 (J.A. 80-81; D.Ex. 30-11 & 12, R19-28 & 29). That amended charge named as respondent the State of Florida, Department of Administration, Division of Retirement (D.Ex. 30-11 & 12) and was transmitted thereto by the EEOC by the same October 1, 1981 letter which transmitted plaintiff Rassler's amended charge (D.Ex. 31-3, R19-28 & 29).

### SUMMARY OF ARGUMENT

In affirming the award of relief herein the 11th Circuit has sanctioned the "regime of discretion" which this Court condemned in *Manhart*, 435 U.S. 702, 722 n.42 (1978). In point of fact the 11th Circuit's decision could have substantial detrimental impact on defined benefit pension plans throughout the United States, for the vast majority of workers in this nation are covered under such plans and, as of January 1983 (six months before this Court's *Norris* decision), at least 45% of such plans had yet to convert to unisex mortality tables for the calculation of their retirement benefits.

Moreover, *Manhart* was limited on its facts and resolved solely the issue of men and women making unequal contributions to a pension plan. It did not resolve the issue of men and women receiving unequal benefits under a retirement plan where equal contributions were collected—especially one such as the FRS whose first and primary single life benefit has always been nondiscriminatory and where the question of discrimination only arose in the use

of sex-distinct mortality tables to calculate elective joint-annuitant options.

Rather, only *Norris*, 463 U.S. 1073 (1983), finally resolved the issue, and it was *not* a narrow decision limited on its facts solely to the issue of third-party insurers under the *Manhart* "open-market" exception. Indeed, application to this case of either the 9th Circuit's decision in *Probe*, 780 F.2d 776 (1986), or the 2d Circuit's decision in *Spirt II*, 735 F.2d 23, 28-29 (1984)—both of which construed and applied *Norris*—would have completely barred the award of relief.

In other words, *Norris* announced a broad equitable rule of relief that all pension plans throughout the United States could continue to use sex-distinct mortality tables to calculate retirement benefits attributable to contributions collected before August 1, 1983. Because plaintiffs and the plaintiff class in this case are all pre-August 1, 1983 retirees whose benefits are therefore completely attributable to pre-*Norris* (pre-August 1, 1983) contributions, this *Norris* rule absolutely bars the award of any kind of relief whatsoever herein. Accordingly, plaintiffs and the plaintiff class herein have no redressable Title VII injury, and thus Article III jurisdiction is lacking over their claims.

Turning to the alternative arguments, first there is no question that all nine members of the *Norris* Court would at a minimum hold no relief should be awarded to pre-*Manhart* retirees, at least where as here vested contractual rights are involved. Indeed, in *Retired Public Employees*, 799 F.2d 511 (1986), the 9th Circuit held that in any event *Manhart* and *Norris* barred the award of re-



lief to pre-*Manhart* retirees under a state-operated defined benefit pension plan. Thus, at a minimum the relief awarded to the pre-*Manhart* retirees in this case must be set aside.

Second, the concept of proration (i.e., the allocation of benefits to before and after a date certain) was agreed upon by all nine members of the *Norris* Court—with their only difference being as to whether the liability cut-off date should be the effective date of the *Manhart* decision or the August 1, 1983 effective date of the *Norris* judgment. Indeed, proration of relief follows ineluctably from establishing a liability cut-off date in a pension benefit case such as this. Further, commentators have recognized the applicability of proration to defined benefit pension plans such as the FRS.

Third and finally, the “continuing violation theory” does not apply in pension benefit cases. Indeed, the *Norris* non-retroactive holding specifically negates its application in cases such as this. The reason it does not apply is because only once are mortality tables ever used in the calculation of a retiree’s benefits—and that is at date of retirement. Thus, in a pension benefit case such as this, the discriminatory event (if any) occurs only upon that one-time use of mortality tables in the calculation of benefits at date of retirement—not at any later time. *Bazemore v. Friday*, 478 U.S. —, 92 L.Ed.2d 315 (1986), being a salary and not pension benefit case, is inapposite and distinguishable. Moreover, as termination of employment

occurs upon date of retirement and as all persons about to retire under the FRS actually receive copies of the calculations of their future monthly retirement benefits, it would appear this Court’s decisions in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *Chardon v. Fernandez*, 454 U.S. 6 (1981), are controlling on the question—i.e., discriminatory event occurs at time employment decision is made and communicated, not at later time when that decision takes effect or its consequences experienced.

Given that the “continuing violation theory” does not apply in this pension benefit case, then only plaintiff Long’s October 7, 1981 EEOC charge of discrimination can be used to establish 42 U.S.C. § 2000e-5(g)’s two-year liability cut-off date, which therefore must be herein fixed at October 7, 1979. In addition, consideration of the Title VII class action limitation tolling principles announced in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), compels the conclusion that the plaintiff class in this case can only include those persons who retired no more than 300 days prior to the July 2, 1982 filing of the initial class action complaint in this cause—although it is recognized that pre-*Crown, Cork & Seal* lower court authority indicates a Title VII class should be more broadly defined as limited only to those persons who suffered a discriminatory event no more than 300 days prior to the date of filing of the named representative plaintiff’s EEOC charge.

## ARGUMENT

### I. BECAUSE NORRIS, AS A MATTER OF LAW, DECLARED A BROAD EQUITABLE RULE OF RELIEF IN TITLE VII SEX-DISCRIMINATION PENSION BENEFIT CASES THAT PENSION PLANS COULD CONTINUE TO PAY BENEFITS ON THE BASIS OF SEX-DISTINCT MORTALITY TABLES TO PERSONS WHO RETIRED PRIOR TO AUGUST 1, 1983, THE AWARD OF RELIEF TO PLAINTIFFS AND THE PLAINTIFF CLASS (WHO ARE ALL PRE-AUGUST 1, 1983 RETIREES) MUST BE SET ASIDE, AND THIS CASE DISMISSED FOR LACK OF A REDRESSABLE INJURY.

By its decision herein—specifically disagreeing with and finding “wrong as a matter of law” the 9th Circuit’s decision in *Probe v. State Teachers’ Retirement System*, 780 F.2d 776, 782-83 (9th Cir.), *cert. denied*, — U.S. —, 90 L.Ed.2d 978 (1986) (“*Probe*”), as well as completely ignoring the 2d Circuit’s vested-contract-right holding in *Spirit v. Teachers’ Insurance & Annuity Ass’n*, 735 F.2d 23, 28-29 (2d Cir.), *cert. denied*, 469 U.S. 881 (1984) (“*Spirit II*”)—the 11th Circuit has sanctioned the “regime of discretion” which this Court condemned in *Manhart*, *supra* 435 U.S. at 722 n.42.

There is no question that were the FRS in the 9th Circuit were *Probe* controls, there would have been a zero liability finding herein rather than the \$43.6 million affirmed below. *See also Retired Public Employees’ Ass’n of California v. State of California*, 799 F.2d 511 (9th Cir. 1986), *rev’g*, 614 F.Supp. 571 (N.D. Cal. 1984). There is also no question that were the FRS in the 2d Circuit where *Spirit II* controls, there also would have been a zero liabil-

ity finding herein. *See also Hannahs v. N.Y. State Teachers’ Retirement System*, No. 78 Civ. 2541-CSH (S.D. N.Y., filed March 9, 1987), *earlier decision*, 26 F.E.P. Cases 527 (S.D. N.Y. 1981), *appeal pending* from March 9, 1987 decision.

Yet, in finding *Manhart* put the State on notice that it should have converted to unisex tables for the calculation of the FRS’ three forms of optional joint-annuitant benefits promptly following the *Manhart* decision, i.e., by October 1, 1978, and so affirming the award of relief to the pre-August 1, 1983 retirees herein, i.e., plaintiffs and the plaintiff class, the 11th Circuit rejected the contrary positions of the 9th and 2d Circuits. In doing so it further specifically rejected as irrelevant any consideration of the impact its affirmance of the retroactive award of relief in this case would have on other pension plans like the FRS; to quote, 805 F.2d at 1551 (J.A. 268-269):

*Manhart* put all pension plans on notice that benefits could not be based on sex-distinct mortality tables; all funds, like the FRS, were forewarned and should have converted to sex-neutral mortality tables at that time. The impact on those pension funds that failed to follow the law after *Manhart* should not be considered here.

This, however, ignores the fact that the FRS is a defined benefit pension plan and that “[t]he vast majority of employees [covered by pension plans in the United States], about 95 percent, . . . receive primary retirement allowances under defined benefit plans,” Bernstein, *The Havoc in Retirement Benefits after Norris*, 70 A.B.A. Journal 80, 81 (Feb. 1984). *See also Hager & Zempleman, The Norris Decision, Its Implications & Applications*, 32 Drake L.

Rev. 913, 916 (1983) (stating that, with respect to Internal Revenue Code qualified plans, "2/3 of all participants in U.S. sponsored pension plans are covered under defined benefit plans").<sup>18</sup>

This also ignores that as of January 1983, six months before this Court's July 1983 *Norris* decision, "[s]ubstantial percentages of both [defined benefit and defined contribution plans (respectively, 45% & 74%) continued to] follow the customary insurance industry practice of using sex-segregated mortality tables in calculating annuity benefits." U.S. Dep't of Labor, *Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits*,

---

<sup>18</sup>See also Note, *Sex-Based Actuarial Assumptions, Title VII & The Equal Pay Act: Employee Benefit Planning Following Manhart & Norris*, 36 Rutgers L. Rev. 839, 859 n.137 (Spring 1984):

While 71% of all private pensions are defined contribution plans, 90% of the workers covered by private plans receive their sole or primary benefit from defined benefit plans. [Citation omitted.]

Indeed, recognizing that the vast majority of employees in the United States are covered under defined benefit plans, the author of the Note lamented, *Id.* at 858:

The tragic irony of *Manhart* and *Norris* is that, while the decisions have been hailed as a giant step forward by women, in absolute terms the decisions will actually funnel millions of pension dollars from women to men.

See also Bernstein, *supra* A.B.A. Journal at 82:

Accordingly, not only will no woman in a defined benefit plan receive an added dollar because of *Norris*, but the Court's decision will worsen their plight and that of other older women.

at p.2 (1983) ("*DOL Cost Study*").<sup>19</sup> Thus it would seem the 11th Circuit was in error in lightly dismissing the impact of its decision on other pension plans when it stated, 805 F.2d at 1550 (J.A. 268), that "although the impact on pension funds and innocent third parties may be burdensome, it will not be devastating."<sup>20</sup> Indeed, by the 11th Circuit's application of the "continuing violation theory" in this pension benefit case, 805 F.2d at 1546 (J.A. 258-259) (see this Brief *infra* at pp. 43-44), any living retiree under any pension plan in the United States (except, perhaps, for those in the 9th and 2d Circuits), even if he or she retired in the 1950's and 1960's, has a potential Title VII action presently available for at least prospective adjustment of pension benefits if sex-distinct tables were used in the calculation of those benefits.

Further, the 11th Circuit's position also ignores the fact that the sole reason retroactive relief was denied in *Manhart*, and that decision made prospective only, was this Court's concern therein with the impact a retroactive holding could have on pension plans throughout the

---

<sup>19</sup>The *DOL Cost Study* was tendered as defendants' exhibit 10A-1 in this case. However, the district court found the issue of national impact irrelevant and so denied its admission (see R19-173 to 174; see also Pet.App. A68-A69). It is here cited because it would nevertheless seem to be judicially noticeable and because it appears Justice Powell judicially noticed it in his *Norris* opinion, see 463 U.S. at 1095 n.1, 1106, & 1106 n.11.

<sup>20</sup>*Cf.* Note, *Norris v. Arizona: A Move Toward Unisex Insurance*, 45 U. La. L. Rev. 149, 160-61 (Spring 1984) (discussing the potential impact of the 98th Congress' proposed "Non-Discrimination in Insurance Act" and stating that "liabilities of 7.7 to 11.0 billion dollars will be experienced, of which 2.9 to 3.6 billion dollars would be borne by state and local governments, 4.0 to 6.4 billion dollars by private employers, and .8 to 1.0 billion dollars by insurance companies").



United States. See 435 U.S. at 720-23. It as well ignores the fact that the prime reason the *Norris* non-retroactive majority also denied retroactive relief, and also made that decision prospective only, was likewise that majority's concern with the impact a retroactive holding could have on pension plans throughout the United States. See 463 U.S. at 1106-07 (Powell, joined by Burger, Blackmun and Rehnquist) and 1110 (O'Connor, concurring separately).

In short, the 11th Circuit's decision in this case—that persons who retired back to at least the March 24, 1972 effective date of Title VII can be awarded prospective adjustment of pension benefits, and that persons who retired subsequent to the effective date of *Manhart* can as well be awarded retrospective adjustment of pension benefits—could have a significant detrimental impact on defined benefit pension plans throughout the United States (again excepting, perhaps, those in the 9th and 2d Circuits). Moreover it is established that the award in this case, were it to be implemented, will impact the FRS participating Florida local governmental employers, which local governments can ill afford any additional financial burdens because they are in or soon heading for serious financial difficulty (see "Statement of the Case" in this Brief *supra* at p. 15).

The bottom line for the 11th Circuit's decision was that *Manhart*, as a matter of law, clearly put the State on notice it should have converted to unisex tables for calculation of the FRS' three optional joint-annuitant benefits. See 805 F.2d at 1547-48 & 1547 n.6 (J.A. 259-263 & 260 n.6). In doing so it dismissed *Norris* as in any way controlling—construing that decision narrowly as limited

on its facts to third-party insurers under the *Manhart* "open market" exception. See 805 F.2d at 1547-48 (J.A. 261-263).

This ignores, however, that both at and subsequent to the time of *Manhart* various federal agencies had conflicting regulations as to whether the use of sex-distinct mortality tables in the calculation of retirement benefits constituted unlawful discrimination where, as here, equal contributions were collected from or on behalf of similarly situated males and females. *Manhart*, *supra* 435 U.S. at 720 n.37 & 714 n.26. It also ignores the fact that well over a year after the *Manhart* decision one such federal agency, HEW, actually determined under its regulations the FRS' use of sex-distinct tables to calculate its three forms of optional joint-annuitant benefits, which resulted in males receiving lower monthly retirement benefits than similarly situated females, was not unlawfully discriminatory (see "Statement of the Case" in this Brief *supra* at pp. 15-16).

Moreover, commentators with eminent credentials in the pension area have noted that *Manhart* created "confusion and ambiguity" which was only "eliminated by [this] Court's decision [in *Norris*]," Hager & Zempleman, *supra* 32 Drake L. Rev. at 914.<sup>21</sup> Indeed, in the period between *Manhart* and *Norris* a somewhat spirited point/

<sup>21</sup>See also, e.g., Genthner, *Arizona v. Norris, Supreme Court Death Knell for Sex Segregated Mortality Tables*, 52 Ins. Counsel Journal 295, 301-02 (April 1985). In fact, in the case at hand the 1983 Florida Legislature was provided with a detailed internal staff briefing memo in February 1983 (D.Ex. 9, R19-7 & 37) which concluded that "[t]he issues regarding the use of sex-linked mortality tables in the calculation of retirement benefits are still very much unresolved in the wake of *Manhart*" (D.Ex. 9-15).

counter-point discussion evolved in the pages of the University of Chicago Law Review as to whether sex-distinct or unisex mortality tables were better for use in the calculation of retirement benefits.<sup>22</sup>

In short, and despite the opinions of the lower courts herein to the contrary, *Manhart* did not settle the issue of whether sex-distinct mortality tables could or could not be used in the calculation of optional joint-annuitant benefits where, as here, the primary single life benefit has always been non-discriminatory. Rather, only *Norris* finally settled the issue. This is especially so when it is remembered *Norris* was the very first case which even came close to resolving the FRS' particular situation, i.e., a non-discriminatory primary single life benefit coupled with elective discriminatory joint-annuitant options—cursorily dismissing such as “irrelevant,” 463 U.S. at 1081 n. 10 & 1088. In fact, in only one circuit court decision in the period between *Manhart* and *Norris* was the issue even touched upon, and that was by Chief Judge Coffin in his concurring opinion in *EEOC v. Colby College*, 589 F.2d 1139, 1146 (1st Cir. 1978), where he speculated that

<sup>22</sup>From earliest to most recent, see (1) Brilmayer, Hekeler, Laycock & Sullivan, *Sex-Discrimination in Employer-Sponsored Insurance Plans: A Legal & Demographic Analysis*, 47 U.Chi.L.Rev. 505 (1980); (2) Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U.Chi.L.Rev. 489 (1982); (3) Brilmayer, Laycock & Sullivan, *The Efficient Use of Group Averages as Nondiscrimination: A Rejoinder to Professor Benston*, 50 U.Chi.L.Rev. 222 (1983); and (4) Benston, *Discrimination & Economic Efficiency in Employee Fringe Benefits: A Clarification of Issues & A Response to Professors Brilmayer, Laycock, & Sullivan*, 50 U.Chi.L.Rev. 250 (1983).

a situation such as that of the FRS might be lawful.<sup>23</sup> Cf. *Sobel v. Yeshiva University*, 566 F.Supp. 1166, 1192 (S.D. N.Y. 1983), *rev'd*, 797 F.2d 1478 (2d Cir. 1986), *later decision*, 656 F.Supp. 587 (S.D. N.Y. 1987) (expressing concern as to what might be appropriate relief in light of this Court's then pending *Norris* decision).

What then did *Manhart* do and not do—what did it address and not address—especially when viewed through the lens of this Court's subsequent decision in *Norris*?

In *Manhart*, 435 U.S. 702 (1978), this Court held it was unlawful discrimination for a government-operated pension plan to collect unequal contributions from males and females to fund equal primary life benefits. While the reasoning of *Manhart* was broad, its holding was limited strictly on its facts to the issue of men and women making “unequal contributions to an employer-operated pension fund,” 435 U.S. at 717, with this Court specifically cautioning its decision was not to be taken as suggesting that Title VII “was intended to revolutionize the insurance and pension industries,” *Ibid*.

<sup>23</sup>Indeed, the 1979 Florida Legislature's response to *Manhart* (see, e.g., R18-76 to 77, & 143 to 144) was much as Chief Judge Coffin had speculated in *EEOC v. Colby College*, *supra* — i.e., to prohibit discrimination in the primary benefit of Florida government pension plans, but to allow options to be actuarially adjusted on the basis of sex (among other things). See Fla. Stat. § 112.66(9) (1979) (Pet.App. A28):

No [Florida government pension] plan shall discriminate in its benefit formula based on color, national origin, sex, or marital status. Nothing herein shall preclude a plan from actuarially adjusting benefits or offering options based on sex, age, early retirement, or disability. [Emphasis added.]

Further, recognizing the impact its decision could have on the pension and insurance industry throughout the United States, the *Manhart* Court refused to award retroactive relief and made its decision prospective only, *Id.* at 718-23, despite the *Manhart* plaintiff's argument that the amount therein involved<sup>24</sup> would not cripple the fund, *Id.* at 722 n.42. Thus the *Manhart* plaintiffs took nothing because, during the pendency of the litigation, the plan was amended to eliminate the unequal male and female contributions, *Id.* at 706.

At this juncture it is important to note the *Manhart* plan was both defined benefit and defined contribution (see J.A. 97-98; cf. J.A. 130-131). Moreover, this Court did not have before it the *Manhart* plan's use of sex-distinct mortality tables in calculating retirement benefits under its elective joint-annuitant options, which resulted in males retiring under said options receiving less than similarly situated females (see J.A. 123-126; cf. J.A. 130-131). Indeed, this was the reason the State's consulting actuaries, per Michael Tierney, advised the State that *Manhart* did not address optional benefits in any pension plan (see J.A. 108-109; again see J.A. 123 & 126; see also R18-80 & R19-198).

In any event, the FRS fully complied with the *Manhart* holding, and more. At all times it exacted equal contributions from or on behalf of similarly situated males and females, and at all times it paid the same primary single life monthly retirement benefit to similarly situated males

<sup>24</sup>As established by the *Manhart* district court summary judgment transcript, between \$200,000 and \$300,000, or about \$250,000 (R18-18).

and females. What it did not do until *Norris* was to calculate its three forms of optional joint-annuitant benefits using sex-neutral mortality tables (see "Statement of the Case" in this Brief *supra* at p. 10), and such of course is what gave rise to this case.

Turning then to *Norris*, 463 U.S. 1073 (1983)—therein a majority of this Court (Marshall, joined by Brennan, White and Stevens, with O'Connor concurring separately) held it was unlawful discrimination for a state-sponsored pension plan to use sex-distinct mortality tables in calculating retirement benefits. However, a different majority (Powell, joined by Burger, Blackmun and Rehnquist, with O'Connor concurring separately) refused to award "retroactive" relief<sup>25</sup> and made the decision prospective only from August 1, 1983, *e.g.*, 463 U.S. at 1075 (per curiam).<sup>26</sup> Thus the retired female component of the *Norris* class, 463 U.S. at 1079, got nothing, and the unretired female component of that class could never get anything because again, during the pendency of the litigation, the *Norris* plan was amended to eliminate the objected to provisions, *Id.* at 1098 n.4.

The *Norris* decision, contrary to the position of the 11th Circuit, was not narrowly limited to the *Manhart*

<sup>25</sup>The "retroactive" relief barred in *Norris* was a prospective "topping up," just as is the major portion of the relief (approximately \$32.3 million) awarded and affirmed in this case. See 463 U.S. at 1092; see also *Id.* at 1091 n.25.

<sup>26</sup>Florida immediately complied with the *Norris* mandate by promptly converting to unisex tables for the calculation of the FRS' three optional joint-annuitant benefits for all persons retiring on or after August 1, 1983 (see "Statement of the Case" in this Brief *supra* at pp. 10-11).



"open-market" exception and third-party insurers. Such position ignores that the holdings in *Norris*, unlike *Manhart*, were nowhere limited to the facts of that case. Such also ignores that the purchase of optional joint-annuitant retirement benefits within an employer-operated pension plan such as the FRS, based on the value of the non-discriminatory primary single life benefit, is essentially the same transaction as the purchase of a joint annuity from a third-party insurer. See *Probe*, *supra* 780 F.2d at 782-83; See also pp. 9-12 of "Response of Respondent David V. Kerns Pro Se in Support of Petition for Writ of Certiorari" filed in this case. Such also means that legal scholars with substantial qualifications in the pension area are wrong as to the implications and applications of *Norris*. E.g., Hager & Zempleman, *supra* 32 Drake L. Rev. at 913 *et seq.*

Moreover, in *Norris* this Court took the highly unusual action of delaying its judgment three weeks from the date of its decision (July 6, 1983) to August 1, 1983. See 463 U.S. at 1073 & 1075 (per curiam). If the Court had not intended *Norris* to be applicable to all pension plans throughout the United States (private, state, local government, employer-operated, and employer-sponsored), it would not have provided a grace period for compliance therewith—particularly as there was absolutely no reason to provide a grace period for the Arizona plan, since by the time it reached this Court the objected to provisions had been eliminated, *Id.* at 1098 n.4.

Further, there was explicit concern expressed by the *Norris* non-retroactive majority (Powell, joined by Burger, Blackmun and Rehnquist, with O'Connor concurring

separately) as to the direct effect a retroactive decision in *Norris* might have had on state and local government pension plans as well as on this nation's pension plans generally, 463 U.S. at 1106-07 (Powell) & 1110 (O'Connor). This was the critical factor in that majority's decision to deny retroactive relief, *Id.* at 1107 (Powell) & 1110-11 (O'Connor), and to delay for three weeks the effective date of the *Norris* judgment, *Id.* at 1075 (per curiam), 1107 n.12 (Powell), & 1111 (O'Connor).<sup>27</sup>

In addition, that majority's non-retroactive holding was not limited to third-party insurers—it "require[d] employers to ensure that benefits derived from contributions collected after the [August 1, 1983] effective date of the [*Norris*] judgment be calculated without regard to the sex of the employee" as well as allowed both "employers and participating insurers to calculate [post-August 1, 1983 retirement] benefits [attributable to pre-August 1, 1983 contributions] as they have in the past," i.e., on the basis of sex-distinct mortality tables, *Id.* 463 U.S. at 1111 (O'Connor) (emphasis added) & 1107 n.12 (Powell).

---

<sup>27</sup>It should be noted that Justice Powell, apparently taking judicial notice thereof, relied in *Norris* upon the 1983 DOL Cost Study (see n.19 herein *supra* at p. 25) as a source of figures for the cost to pension plans nationally of the effect of an equal retirement benefits ruling, see 463 U.S. at 1095 n.1, 1106, & 1106 n.11. Indeed, a cursory perusal of that DOL Cost Study would quickly reveal that it covers all state, local government, and private defined benefit and defined contribution pension plans, with no distinction as to whether employer-operated or employer-sponsored. In short, it appears the *Norris* non-retroactive majority clearly had in mind plans such as the FRS, among other pension plans generally, when it considered the impact the *Norris* decision would have on pension plans throughout the United States.

Further, and quite possibly the most important thing underscoring the broadness of the *Norris* non-retroactive holding, is that Justice Marshall (joined by Brennan, White and Stevens) in his dissent therefrom would have held *Manhart* put pension plans on notice of the illegality of the use of sex-distinct mortality tables in the calculation of retirement benefits, and so would have permitted the award of retroactive relief at least back to the effective date *Manhart*. See 463 U.S. at 1091-95. Indeed, Justice Marshall would have held, just as the district and circuit courts did herein (see respectively, Pet.App. A82 & A62, and 805 F.2d at 1548 (J.A. 262)), that "[a]fter *Manhart* an employer could not reasonably have assumed that a sex-based plan would be lawful," 463 U.S. at 1093 n.26. By rejecting this dissenting position the *Norris* non-retroactive majority also, at least implicitly, rejected Justice Marshall's argument that *Manhart* put all pension plans in the United States on notice they should have converted to unisex tables for the calculation of retirement benefits and, accordingly, also rejected the position adopted by the courts herein below.

Finally, the 9th Circuit applied the *Norris* non-retroactive holding in *Probe*, 780 F.2d 776 (9th Cir.), *cert. denied*, — U.S. —, 90 L.Ed.2d 978 (1986), to a pension plan in all essential respects identical to the FRS. The *Probe* plan, just as the FRS, was a state administered and operated defined benefit pension plan established and administered pursuant to the provisions of state statutes. 780 F.2d at 778, 778 nn.1 & 2, 781. It, just as the FRS, paid the same monthly retirement benefits to similarly situated males and females under its first and primary single life option. *Id.* at 778, 778 n.1, 782. It, just as the FRS, offered

optional joint-annuitant retirement benefits under which, because of the application of sex-distinct mortality tables prior to August 1, 1983, males received less than similarly situated females. *Id.* at 778-79, 782. Also in *Probe*, just as here, the plan was ordered to prospectively equalize the male retirees' benefits. *Id.* at 779.

However in *Probe*, unlike here, the 9th Circuit held *Norris* foreclosed the prospective equalization of retirement benefits based on contributions made prior to the effective date of *Norris*, 780 F.2d at 782-83; *cf. Id.* at 783-84 (addressing "Equal Pay Act" claims). In so ruling the court, addressing the *Manhart* "open market" exception, specifically concluded the *Probe* plan "reasonably could have assumed that it was lawful to provide an optional annuity system that reflected plans offered by insurance companies on the open market." *Id.* at 782-83. As said, application of *Probe* to this case would have completely barred the award of relief. And also as said, the 11th Circuit specifically disagreed with and declined to follow *Probe*—finding it "wrong as a matter of law," 805 F.2d at 1548 (J.A. 262).

Similarly, the 2d Circuit construed and applied *Norris* in *Spirt II*, 735 F.2d 23 (2d Cir.), *cert. denied*, 469 U.S. 881 (1984). *Spirt II*'s vested-contract-right holding, *Id.* at 28-29, was also presented to the lower courts herein as foreclosing the award of relief in this case, though neither addressed it. Specifically, because all retirees under the FRS obtain a vested contractual right to the full amount of their retirement benefits, which arises as of the effective date of retirement and which prevents the State from ever subsequently reducing the same, and because



there is no question the award in this case would be paid by the employers (the State and its FRS participating governments) or the plan (the FRS) (see "Statement of the Case" in this Brief *supra* at p. 15), the State submitted *Spirt II* likewise barred the award of relief herein.

*Spirt II*, just as *Probe*, also dealt with the issue of whether *Norris* foreclosed the award of prospective topping up of future retirement benefits to pre-August 1, 1983 retirees, 735 F.2d at 26, which the 2d Circuit (just as the 9th Circuit in *Probe*) recognized was a limited form of retroactive relief subject to the *Norris* prohibition, *Id.* at 25-26. The 2d Circuit specifically found *Norris* foreclosed "any possibility of the retroactive imposition of added financial burdens upon employers or [pension] plans . . .," *Id.* at 29; accord, *Id.* at 28. This determination was essential to its vested-contract-right holding, *Id.* at 28-29, that with respect to a guaranteed 2½% as to which all the pre-August 1, 1983 retirees accordingly had a vested contractual right, *Norris* barred the award of relief—even though the 2d Circuit considered this 2½% "insignificant." Thus, application of *Spirt II* to this case would have also barred the award of relief herein.<sup>28</sup>

In sum *Norris*, especially as construed and applied by *Probe* and *Spirt II*, announced a broad equitable rule of relief with respect to all Title VII sex-discrimination pen-

<sup>28</sup>The 2d Circuit also held in *Spirt II* that *Norris* did not foreclose the award of relief to pre-August 1, 1983 retirees where vested contractual rights were not involved and where, therefore, the award would not impact the employer or the plan. 735 F.2d at 27-28. However, this aspect of *Spirt II* is inapplicable to the instant case because of the vested contractual rights of FRS retirees.

sion benefit cases such as this, which rule was "founded upon principle" specifically for the purpose of preventing "a regime of discretion [such as that sanctioned by the 11th Circuit in this case] that produce[s] different results for breaches of duty that cannot be differentiated in policy," *Manhart, supra* 435 U.S. at 722 n.42 [quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)]. See *Norris, supra* 463 U.S. at 1110-11 (O'Connor):

This real danger of bankrupting pension plans requires that our decision be made prospective. Such a prospective holding is, of course, consistent with our equitable powers under Title VII to fashion an appropriate remedy. [Citations omitted.]

This rule—that pension plans throughout the United States could continue to pay retirement benefits to persons who retired prior to August 1, 1983, calculated on the basis of sex-distinct mortality tables—bars relief in this case, for the State's asserted breach of duty herein "cannot be differentiated in policy" from *Norris* or *Probe* or *Spirt II*.

In other words, because only pre-August 1, 1983 retirees are before the Court and because, therefore, all of their benefits are attributable to pre-August 1, 1983 contributions, plaintiffs and the plaintiff class have no redressable Title VII injury and there exists no basis for the award of injunctive or monetary relief of any kind in this case. Indeed, because in this case there exists no basis for the award of injunctive or monetary relief of any kind, the district court's early grant of declaratory relief on the issue of liability only (Pet.App. A76, ¶ 11) must also be set aside. *Green v. Mansour*, 474 U.S. —, 88 L.Ed.2d 371 (1985).



Lastly, as for the interplay of Article III with the foregoing, it should be emphasized that while plaintiffs and the plaintiff class clearly had a cognizable potential redressable injury when they filed this suit in 1982, because of *Norris* as of August 1, 1983, and thereafter they no longer had any. This of course means that Article III jurisdiction is now lacking over their claims. See *Allen v. Wright*, 468 U.S. 737 (1984), pointing out the Article III jurisdictional standing requirement has two core components "derived directly from the Constitution," *Id.* at 751, the "fairly traceable" injury component and the "redressability" of injury component, *Id.* at 751 & 753 n.19, each necessitating separate inquiry, *Id.* at 753 n.19. As for "redressability," see, e.g., *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976):

Absent . . . a showing [by the plaintiff of an injury to himself that is likely to be addressed by a favorable decision], exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.

And *Id.* at 39:

The necessity that the plaintiff who seeks to invoke judicial power stands to profit in some personal interest remains an Art. III requirement.

See also Annot., *Standing—Article III Requirements*, 70 L.Ed.2d 941, § 4 at 953-54 (1983). In short, with plaintiffs and the plaintiff class having no redressable injury because of *Norris*, Article III jurisdiction is now lacking over their claims.

**II(A). ALTERNATIVELY, MANHART AND NORRIS AT A MINIMUM PRECLUDE ANY AWARD OF RELIEF TO PRE-MANHART RETIREES, AND THUS THE AWARD OF RELIEF TO THE PRE-MANHART RETIREES IN THIS CASE MUST BE SET ASIDE.**

The 11th Circuit affirmed the award of retroactive relief (in the form of prospective adjustment of pension benefits only) to the pre-*Manhart* retirees in this case (see n.12 herein *supra* at p. 7). The basis of the 11th Circuit's decision in this regard was, in essence, that there was no connection between benefits paid and contributions collected by the FRS, see 805 F.2d at 1549 (J.A. 264), and thus the award of relief herein was not impermissibly retroactive under *Norris*.

This ignores, however, that the FRS is funded entirely by contributions and that unrebutted expert testimony in this case established in a defined benefit plan, especially one such as the FRS funded entirely by contributions, there is a direct connection between contributions and benefits just as in a defined contribution plan—the only difference being that in a defined benefit plan the level of the benefit determines the amount of the contribution, while in a defined contribution plan the level of the contribution determines the amount of the benefit (see "Statement of the Case" in this Brief *supra* at p. 14). This also ignores that the Elected State Officers Class of the FRS continues to be partially employee contributory and that all retirees through 1983, i.e., plaintiffs and the plaintiff class, had personal contributions in the fund (see "Statement of the Case" *supra* at p. 9). This also places

the 11th Circuit in square and direct conflict with the 9th Circuit's decision in *Retired Public Employees' Ass'n of State of California v. State of California*, 799 F.2d 511 (9th Cir. 1986), *rev'g*, 614 F.Supp. 571 (N.D. Cal. 1984) ("*Retired Public Employees*"), and ignores that "[w]hen a court directs a change in [retirement] benefits based on contributions made before the court's order, the court is awarding relief that is fundamentally retroactive in nature," *Norris*, *supra* 463 U.S. at 1092 (Marshall); *accord*, *Id.* at 1105 n.10 (Powell).

Moreover, since all FRS retirees obtain a vested contractual right to the full amount of their retirement benefits which arises as of date of retirement, there appears to be no question that all nine members of the *Norris* Court would, at a minimum, hold no relief of any sort should have been awarded to the pre-*Manhart* retirees herein. In this regard, careful attention is directed to Justice Marshall's dissent (joined by Brennan, White and Stevens) on the *Norris* non-retroactive liability issue, 463 U.S. at 1093-95. Thereat, *Id.* at 1094, Justice Marshall and his three brethren indicated they would not award prospective topping up of pension benefits attributable to contributions collected before the date of *Manhart* where, as here, retirees have a vested contractual right to the full amount of their retirement benefits.

In this respect, the only difference between the *Norris* Court members was as to liability cut-off date. As said, for Justice Marshall and his three brethren it would have been the date of *Manhart* with persons retiring prior thereto entitled to no relief where, as here, vested contractual rights are involved, *Id.* at 1094-95. For the re-

maintaining majority the liability cut-off date is the August 1, 1983 effective date of the *Norris* judgment, with persons retiring thereto entitled to no relief, *Id.* at 1075 (per curiam), 1107 n.12 (Powell, joined by Burger, Blackmun and Rehnquist), 1111 (O'Connor).

In short it seems clear all nine members of the *Norris* Court, were they still sitting, would at a minimum hold no relief of any sort should be awarded to pre-*Manhart* retirees in a case such as this—just as the 9th Circuit held in *Retired Public Employees*. Thus, at a minimum the award of relief to the pre-*Manhart* retirees in this case must be set aside.

**II(B). ALTERNATIVELY, THE AWARD OF RELIEF TO THE POST-MANHART PORTION OF THE PLAINTIFF CLASS HEREIN MUST BE PRORATED TO REFLECT ONLY THOSE BENEFITS ATTRIBUTABLE TO CONTRIBUTIONS COLLECTED, OR BENEFITS ACCRUED, AFTER THE APPROPRIATE LIABILITY CUT-OFF DATE.**

Notwithstanding that proration calculations (i.e., the allocation of benefits to before and after a date certain) were actually performed in this case under both "contribution" and "accrued benefit" methodologies (*see* "Statement of the Case" in this Brief *supra* at pp. 14-15) and notwithstanding that all nine members of the *Norris* Court agreed as a matter of law on the concept of proration (with again their only difference being as to the liability cut-off date), the courts below refused to prorate the relief awarded herein (*see*, respectively, Pet.App. A65-A66, and 805 F.2d at 1551 (J.A. 270)).

In *Norris* it is clear that, for any person retiring after *Manhart*, Justice Marshall and his three brethren would have only required proration of relief (i.e., topping up to the unisex level of only that portion of the retiree's pension benefits attributable to post-*Manhart* contributions) where, as here, vested contractual rights are involved, see 463 U.S. at 1094-95; to quote, *Id.* at 1095:

. . . [The State] need only ensure that [the female retiree's] monthly benefits are no lower than they would have been had her post-*Manhart* contributions been treated in the same way as a similarly situated male employee.

The non-retroactive *Norris* majority also agreed on proration, but as of August 1, 1983, rather than the date of *Manhart*. *Id.* at 1107 n.12 & 1111.<sup>29</sup>

Moreover, in the wake of *Norris* commentators with substantial credentials in the pension area have recognized the applicability of proration (at least under an "accrued benefit" methodology) to defined benefit pension plans such as the FRS. Again see Hager & Zempleman, *supra* 32 Drake L. Rev. at 936-37 & 938-39. Additionally, the State's actuarial expert testified that accrued benefit proration would be more directly applicable to a defined benefit plan such as the FRS, for use of that method would not require approximation (J.A. 107-108).

<sup>29</sup>Indeed, application of proration in a pension benefit case such as this follows ineluctably from the fixing of a liability cut-off date, for such by definition requires calculation under unisex tables of benefits accrued or attributable to contributions collected after such date, while benefits accrued or attributable to contributions collected prior to such date would remain calculated under sex-distinct tables.

In short, as a matter of law proration should have been applied to the award of relief in this case—at least under an "accrued benefit" methodology. Thus, at a minimum the award of relief to the post-*Manhart* retirees herein must be prorated to reflect only those benefits accrued, or attributable to contributions collected, after the appropriate liability cut-off date—either this case's October 1, 1978 *Manhart* effective date (at the very best) or actually some later date (see argument II(C) immediately below).

**II(C). ALTERNATIVELY, 42 U.S.C. § 2000e-5(g)'s TWO-YEAR LIABILITY CUT-OFF DATE MUST BE FIXED IN THIS CASE AT OCTOBER 7, 1979—TWO YEARS BEFORE PLAINTIFF LONG'S OCTOBER 7, 1981 EEOC CHARGE OF DISCRIMINATION—AND THE PLAINTIFF CLASS LIMITED TO THOSE PERSONS WHO RETIRED NO MORE THAN 300 DAYS PRIOR TO THE JULY 2, 1982 FILING OF THE INITIAL CLASS ACTION COMPLAINT IN THIS CAUSE (OR, AT BEST, TO THOSE PERSONS WHO RETIRED NO MORE THAN 300 DAYS PRIOR TO PLAINTIFF LONG'S OCTOBER 7, 1981 EEOC CHARGE).**

The issue of perhaps the greatest importance and potentially most devastating national impact in this case is the 11th Circuit's application of the "continuing violation theory" in refusing to limit the scope of the class or even consider what might be the appropriate 42 U.S.C. § 2000e-5(g) two-year liability cut-off date herein, 805 F.2d at 1546 (J.A. 258-259) (see this Brief *supra* at p. 25).

The 11th Circuit did not dispute the State's point that, in order to be included in a Title VII class, a potential class



member must have suffered a discriminatory event within the requisite time period before the filing of an appropriate EEOC charge of discrimination by a named representative plaintiff—which in Florida's case is 300 days.<sup>30</sup> Rather, citing to *Bazemore v. Friday*, 478 U.S. —, 92 L.Ed. 2d 315 (1986) ("*Bazemore*"), it held that any retiree no matter when he retired was in the class so long as he received a monthly benefit check within the requisite 300-day period. 805 F.2d at 1546 (J.A. 258-259).

However, *Bazemore* was a pure salary case—not a pension case. Moreover, nowhere did *Bazemore* even cite *Manhart* or *Norris*, and it most certainly does not undercut their continued vitality in the pension context nor eliminate the fact both denied retroactive relief. Indeed *Norris*, by its denial of retroactive relief in the form of prospective adjustment of pension benefits, negates application of the continuing violation theory in the pension context—for had the theory applied, prospective adjustment of pension benefits attributable to pre-August 1, 1983 contributions could not have been denied.

Additionally *Norris*, by its focus on pension plan funding and benefit calculation, clearly indicates that in a Title VII pension benefit case such as this it is the calculation of benefits at date of retirement which is the discriminatory event, for funding as to any individual retiree ends as of date of retirement and it is only at such time that mortality tables are applied in benefit calculation and the dis-

<sup>30</sup>Florida became a recognized EEOC deferral state on September 7, 1978. See 43 Fed.Reg. 39775 (1978). Thus 42 U.S.C. § 2000e-5(e)'s 300-day limitation period is applicable to the matters involved in this case.

crimination event, if any, occurs—not at any later time. Moreover, in Florida's case every person who is about to retire under the FRS actually receives copies of the calculations of his or her future monthly retirement benefits (see Pet.App. A109, ¶¶ 40-41, & A46, ¶¶ 40-41). Thus, controlling in the instant case would appear to be this Court's decisions in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *Chardon v. Fernandez*, 454 U.S. 6 (1981), which held the discriminatory event occurs at the time the employment decision is made and communicated, not at some later time when that decision takes effect or its consequences experienced.

In fact, a district court in the 2d Circuit has specifically held the "continuing violation theory" does not apply in a Title VII pension benefit case—that it is the calculation of benefits at date of retirement which is the discriminatory event. See *Hannahs v. N.Y. State Teachers' Retirement System*, *supra* 26 F.E.P. Cases at 531. In other words *Bazemore*, being a salary case, is inapposite in the instant pension context.<sup>31</sup>

<sup>31</sup>Indeed, the factual situation in *Bazemore* was that North Carolina Extension Service workers' salaries were determined annually as a result of joint meetings between the various North Carolina Boards of County Commissioners and the Extension Service. See 92 L.Ed.2d at 324-25. In other words, at a minimum each year there was another employment decision regarding salaries and, thus, another current discriminatory event. In contrast, the only discriminatory event of any kind in a pension benefit case such as this would be the use of sex-distinct mortality tables at date of retirement to calculate future monthly retirement benefits. Thereafter the payment of benefits is made pursuant to that retirement date benefit calculation, and never again does the discriminatory event—i.e., the use of sex-distinct mortality tables in benefit calculation—ever occur.

Given that the "continuing violation theory" does not apply in this pension benefit case, then only plaintiff Long's October 7, 1981 EEOC charge of discrimination can be looked to for the purposes of Title VII's two-year liability cut-off date and 300-day limitation period. This is because plaintiff Haas never filed an EEOC charge, and intervening plaintiff Rassler's initial charge was extremely untimely, thus rendering it of no legal effect. *E.g.*, *Delaware State College v. Ricks*, *supra*; *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). Moreover, such is irrespective of the fact defendants established without rebuttal that plaintiff Rassler's initial charge failed to put them on notice (*see* "Statement of the Case" in this Brief *supra* at p. 17).<sup>32</sup>

Thus, the two-year liability cut-off date in this case must be fixed at October 7, 1979—two years before plaintiff Long's October 7, 1981 EEOC charge—because he is

---

<sup>32</sup>Curiously, the district court used class member Samaha's initial December 27, 1979 EEOC charge to fix the 42 U.S.C. § 2000e-5(g) two-year liability cut-off date in this case (*see* Pet. App. A90-A91), though nowhere in the law is there to be found the slightest indication that a class-member's, rather than a named representative plaintiff's, EEOC charge can be used to fix 42 U.S.C. § 2000e-5(g)'s two-year liability cut-off date. In any event, class-member Samaha's initial charge was untimely, and again defendants established without rebuttal that it failed to put them on notice.

Moreover, Mr. Samaha's Title VII claims in this case would also be time barred, for he (just as plaintiff Rassler) filed his initial EEOC charge more than 300 days after his January 29, 1979 date of retirement. In addition, as he retired more than 300 days before the July 1982 initial filing of the complaint in this cause, he can in no way take advantage of the tolling of Title VII limitation periods which occurs upon the filing of a Title VII class action complaint, *see Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983).

the only named plaintiff with a viable EEOC charge. *Cf. Manhart*, *supra* 435 U.S. at 722 n.42 ("[e]mployers are not liable for improper contributions made more than two years before a charge was filed with the EEOC").

As for whether the class should be limited to those persons who retired no more than 300 days prior to plaintiff Long's October 7, 1981 EEOC charge or whether, instead, it should be limited only to those persons who retired no more than 300 days prior to the July 2, 1982 filing of the initial class action complaint in this matter, the 11th Circuit followed *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 813 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982) (which case defendants had submitted), and adhered to the concept of 300 days prior to the earliest appropriate EEOC charge of a named representative plaintiff.

However, *Payne* was decided prior to this Court's decision in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), holding to the effect that Title VII limitation periods for putative class members are only tolled upon the filing of a class action complaint in federal court. Further reflection upon *Crown, Cork & Seal* and its announced Title VII class action tolling principles, appears to compel the conclusion that a Title VII class in an EEOC deferral state, such as Florida, can only include those persons who suffered a discriminatory event within 300 days prior to the filing of the initial federal court class action complaint. In other words, the Title VII claim of any class member who retired more than 300 days prior to the filing of the initial federal court class action complaint would be time barred, as no portion of such 300-day limitations period would have been tolled under *Crown, Cork & Seal*.

In sum, the liability cut-off date in this case must be fixed at October 7, 1979—two years before plaintiff Long's October 7, 1981 EEOC charge—and the class limited only to those persons who retired no more than 300 days prior to the July 2, 1982 filing of the initial class action complaint in this matter or, at best, only to those persons who retired no more than 300 days prior to plaintiff Long's October 7, 1981 EEOC charge.

—o—

### CONCLUSION

As to Question 1 and the first argument herein, defendants respectfully request that the decisions and judgment below be reversed and vacated, that all awards of relief (including declaratory) be vacated, and that this case be remanded with instructions that it be dismissed for lack of Article III jurisdiction.

Alternatively, as to Questions 2(A), 2(B) & 2(C) and the alternative three arguments thereupon, defendants respectfully request that the award of relief to the pre-*Manhart* retirees in this case be vacated, that the Court hold the relief awarded to the post-*Manhart* retirees in this case must be prorated with the liability cut-off date herein fixed at October 7, 1979 (two years prior to plaintiff Long's October 7, 1981 EEOC charge), that the plaintiff class herein be limited to only those persons who retired no more than 300 days prior to the July 2, 1982 filing of the initial class action complaint in this cause, and that the case be remanded with appropriate instructions that the relief to

be awarded to the post-*Manhart* retirees be recalculated and fixed in light of the foregoing.

Respectfully submitted,

CHARLES T. COLLETTE  
Counsel of Record  
DOUGLAS A. MANG  
BRUCE A. MINNICK  
Mang, Rett & Collette, P.A.  
Post Office Box 11127  
Tallahassee, FL 32302-3127  
(904) 222-7710

AUGUSTUS D. AIKEN, JR.  
General Counsel  
Florida Department of  
Administration  
435 Carlton Building  
Tallahassee, FL 32399-1550  
(904) 488-4747

*Attorneys for Petitioners*

November 1987



**RESPONDENT'S**

**BRIEF**

Supreme Court, U.S.  
**FILED**  
DEC 24 1987  
JOSEPH F. SPANIOLO, JR.  
CLERK

9

No. 86-1685

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1986

---

STATE OF FLORIDA, et al,  
Petitioners,

v.

HUGHLAN LONG, et al, etc.,  
Respondents

---

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

BRIEF OF RESPONDENT  
DAVID V. KERNS PRO SE

---

David V. Kerns, pro se  
418 Vinnedge Ride  
Tallahassee, Fla. 32303  
(904) 385-1366

**BEST AVAILABLE COPY**

29 PM

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY  
AT THE TIME OF FILMING. IF AND WHEN A  
BETTER COPY CAN BE OBTAINED, A NEW FICHE  
WILL BE ISSUED.

ALTERNATIVE STATEMENT OF  
QUESTION PRESENTED FOR REVIEW

---

DURING THE INTERVAL BETWEEN  
MANHART AND MORRIS, WERE THE  
ADMINISTRATORS OF THE FLORIDA  
RETIREMENT SYSTEM "ON NOTICE"  
THAT THE USE OF GENDER-BASED  
TABLES WAS IMPERMISSIBLE?



### PARTIES TO THE PROCEEDING

Petitioners herein are the State of Florida, Bob Martinez as Governor, Adis Maria Vila as Secretary of Administration and Andrew J. McMullian III as Director of the Division of Retirement, Department of Administration; they were appellants/cross appellees in the 11th Circuit and defendants in the trial court (U. S. District Court for the Northern District of Florida, Tallahassee Division).

Respondents in this Court include the named plaintiffs Hughlan Long, S. Dewey Haas and Carl Rassler and members of a noticed class known as "subclass 'A'" or their surviving joint annuitants or beneficiaries; they were appellees/cross appellants in the 11th Circuit and plaintiffs in the trial court.

David V. Kerns, pro se, is referred to herein as "this respondent". He is an

unnamed noticed member of subclass "A" by virtue of his retirement on June 30, 1982 and his election of F. R. S. Option 3. Prior to that date he was general counsel of the Department of Administration and as such the legal advisor to the Secretary of Administration.

Judson Freeman is also an unnamed noticed member of subclass "A" appearing on his own behalf.

No. 86-1685

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1986

---

STATE OF FLORIDA, et al,  
Petitioners,  
v.

HUGHLAN LONG, et al, etc.,  
Respondents

---

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

BRIEF OF RESPONDENT  
DAVID V. KERNS PRO SE

---

OPINIONS BELOW

The decision of the 11th Circuit (J. A.  
249-271) is reported at 805 F.2d 1542. The  
judgment of the District Court (Pet. App.  
A33-A34) and its orders of May 26, 1986,  
March 31, 1986 and March 16, 1984 (Pet. App.

A35-A36, A37-A70 and A71-A83) are not reported.

#### STATEMENT OF THE CASE

##### I. Preface.

The "Statement of the Case" in the State of Florida's "Brief for Petitioners" is hereby adopted in its entirety with the following short additions.

##### II. Proceedings in Lower Courts.

Upon receipt of the class notice in this proceeding in the District Court, this class member requested leave to appear pro se (R5-2238-1). Soon after, this member received a letter from Plaintiffs' attorney asking his opinion of the case, to which this member sent a hand-written reply dated September 14, 1983 (R5-2678-8; see also Defendants' Exhibit 15). On the first day of the Impact Hearing, February 3, 1983, this

member was called by the State and testified as to what actually happened in the legal office of the Secretary of Administration during the period after Manhart and prior to his retirement, which occurred approximately a year prior to Norris. (R18-146 to 171)

The reason for these actions was this member's position, prior to his retirement on June 30, 1982, as General Counsel to the State's Department of Administration, in which capacity he served as legal advisor to the Secretary of Administration (R18-147; R13-2896-21). One of the several divisions in the Department of Administration was and is the Division of Retirement, which has among its duties the administration of the Florida Retirement System. These actions further resulted from this member's opinion expressed from time to time prior to his retirement that



the law was too unsettled for the Department to require the Division to take action and that the Department should await further judicial clarification as to the actuarial tables to be used when a retiring employee sells back his one-life basic retirement benefit in exchange for a two-life option (R13-2896-21,22). As expressed in the testimony (R18-149 et seq.), this transaction takes place after the termination of the employment status to which the Act of Congress was addressed and is essentially an insurance transaction, so there was reasonable basis for a court to find that the intent of Congress was not to carry the application of its Act to this extreme (i.e., the purchase of an annuity option after employment and upon retirement).

Despite this and other consistent

testimony by Nevin Smith (R18-74 et seq.), A. J. McMullian (R18-171 et seq.), and M. Tierney (R19-100 et seq.), the District Court held this reasoning showed "poor judgment" and that the State had no reasonable ground for not revising its retirement system immediately following the Manhart decision.

On appeal to the Court of Appeals for the Eleventh Circuit, this respondent filed a brief addressed solely to the issue just stated ( i.e., that the State's administrators exercised "poor judgment" and acted "unreasonably" in failing to convert to unisex tables promptly following this Court's decision in Manhart.) However, the 11th Circuit, in the portion of its opinion entitled "Notice" (Pet. App. A1 at A11), followed the District Court and rejected both these views and the decision of the 9th Circuit

either respect.

CONCLUSION

For the reasons stated, this respondent respectfully submits that prior to 1983 the law was sufficiently uncertain as to justify the hesitation of the Florida retirement administrators in changing their system until they would receive either legislative direction or further judicial clarification and guidance as to the propriety of the continued use of gender-distinct tables in calculating retirement benefit options.

Respectfully submitted,

*David V. Kerns*

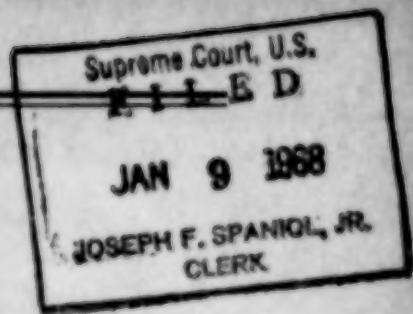
David V. Kerns  
Respondent pro se  
418 Vinnedge Ride  
Tallahassee, Fla. 32303  
(904) 385-1366

**RESPONDENT'S**

**BRIEF**



10  
CASE NO. 86-1685



in the  
**Supreme Court**  
of the  
**United States**  
OCTOBER TERM, 1987

STATE OF FLORIDA, et al.,

*Petitioners,*

*vs.*

HUGHLAN LONG, S. Dewey Haas, and Carl Rassler,  
individually and on behalf of all retired and present  
male employees subject to the Florida Retirement  
System established by Chapter 121, Florida Statutes,  
as well as the surviving joint annuitants of any  
deceased retired male employees,

*Respondents.*

On Writ Of Certiorari To The United States  
Court Of Appeals for the Eleventh Circuit

**BRIEF FOR RESPONDENTS**

Woodrow M. Melvin, Jr., Esq.  
*Counsel of Record*  
Keith Olin, Esq.

Ruden, Barnett, McClosky,  
Smith, Schuster & Russell, P.A.  
One Biscayne Tower—Suite 2020  
Two South Biscayne Boulevard  
Miami, Florida 33131  
(305) 371-6262

Jerold Feuer, Esq.  
402 N.E. 36th Street  
Miami, Florida 33137-3913

David Popper, Esq.  
Dadeland Square Bldg.  
7700 N. Kendall Drive  
Suite 710  
Miami, Florida 33156  
*Attorneys for Respondents*

**BEST AVAILABLE COPY**

5487

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE CASE .....	2
A. Plaintiff's Statement Of Facts Is A <i>Sub Silentio</i> Attack Upon The Findings By The District Court .....	2
B. How The Florida Retirement System Functions .....	3
C. What The Employer Knew About The Illegality Of Sex-Based Mortality Tables .....	4
D. Why The FRS Has The Ability To Sustain The Relief Awarded Without A Detrimental Impact .....	8
E. Why Proration Was Rejected .....	10
F. How The Parameters Of Plaintiffs' Class Were Established And How Notice Of Its EEOC Charges Was Given .....	13
SUMMARY OF THE ARGUMENT .....	15
ARGUMENT .....	17
I. SUPREME COURT CASELAW COMPELS AN AWARD OF RETROACTIVE RELIEF IN THIS CASE .....	17
A. Introduction .....	17
B. <i>Manhart</i> And <i>Norris</i> .....	18
C. <i>Probe</i> .....	25
D. <i>Spirt II</i> .....	27
E. Retroactive Relief Is Required .....	28

## TABLE OF CONTENTS (Continued)

	Page
II. PRORATION CONCEPTS ARE WHOLLY INAPPLICABLE, FACTUALLY AND LEGALLY, TO REDUCE THE RELIEF TO THE PLAINTIFF CLASS IN THIS CASE	32
III. THERE IS NO BASIS TO DISTURB OR MODIFY THE TRIAL COURT'S RULINGS AS TO CLASS MEMBERSHIP OR THE BEGINNING DATE FOR THE TWO-YEAR BACK PAY PERIOD	37
A. The Discriminatory Event	37
B. Waiver	43
CONCLUSION	45

## TABLE OF AUTHORITIES

Cases	Page
<i>Albermarle Paper Co. v. Moody</i> , 422 U.S. 405, 95 S.Ct. 2362 (1975)	10, 29
<i>Allen v. United States Steel Corp.</i> , 665 F.2d 689 (5th Cir. 1982)	39
<i>Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris</i> , 463 U.S. 1073, 103 S.Ct. 3492 (1983)	passim
<i>Avagliano v. Sumitomo Shoji America, Inc.</i> , 103 F.R.D. 562 (S.D.N.Y. 1984)	41
<i>Bazemore v. Friday</i> , 478 U.S. —, 106 S.Ct. 3000 (1986)	35, 36, 38, 39, 40
<i>Bowe v. Colgate-Palmolive Co.</i> , 416 F.2d 711 (7th Cir. 1969)	42
<i>Carpenter v. Stephen F. Austin State University</i> , 706 F.2d 608 (5th Cir. 1983)	30
<i>Chardon v. Fernandez</i> , 454 U.S. 6, 102 S.Ct. 28 (1981)	40
<i>Chevron Oil Co. v. Huson</i> , 404 U.S. 97, 92 S.Ct. 349 (1971)	23, 36
<i>City of Los Angeles Dep't of Water and Power v. Manhart</i> , 435 U.S. 702, 98 S.Ct. 1370 (1978)	passim
<i>Crown, Cork &amp; Seal Co. v. Parker</i> , 462 U.S. 345, 103 S.Ct. 2392 (1983)	41
<i>Delaware State College v. Ricks</i> , 449 U.S. 250, 101 S.Ct. 498 (1980)	40



# TABLE OF AUTHORITIES—(Continued)

Cases	Page
<i>Dobbs v. City of Atlanta, Ga.</i> , 606 F.2d 557 (5th Cir. 1979) .....	39
<i>EEOC v. Atlanta Gaslight Co.</i> , 751 F.2d 1188 (11th Cir. 1985), cert. denied, 474 U.S. 968, 106 S.Ct. 333 (1985) .....	28
<i>EEOC v. Texas Industries, Inc.</i> , 782 F.2d 547 (5th Cir. 1986) .....	23
<i>Franks v. Bowman Transportation Co., Inc.</i> , 424 U.S. 747, 96 S.Ct. 1251 (1976) .....	28, 32
<i>Graham v. State of New York</i> Dep't of Civil Service, 653 F.Supp 1363 (S.D.N.Y. 1987), appeal pending .....	23, 28
<i>Green v. Mansour</i> , 474 U.S. 64, 106 S.Ct. 423 (1985), reh'g denied, 474 U.S. 1111, 106 S.Ct. 900 (1986) .....	31
<i>Guardians Ass'n of New York City Police Dep't v. Civil</i> <i>Service Comm'n of City of New York</i> , 633 F.2d 232 (2d Cir. 1980), <i>aff'd in part</i> <i>with opinion</i> , 463 U.S. 582, 103 S.Ct. 3221, cert. denied in part, 463 U.S. 1228, 103 S.Ct. 3568 (1983) .....	39
<i>Hervey v. City of Little Rock</i> , 787 F.2d 1223 (8th Cir. 1986) .....	41
<i>Int'l Brotherhood of Teamsters v. United States</i> , 431 U.S. 324, 97 S.Ct. 1843 (1977) .....	29

# TABLE OF AUTHORITIES—(Continued)

Cases	Page
<i>Int'l Union, United Auto., Aerospace and Agric.</i> <i>Implement Workers of America v. Brock</i> , 477 U.S. 274, 106 S.Ct. 2523 (1986) .....	31
<i>Jackson v. Seaboard Coast Line R.R.</i> , 678 F.2d 992 (11th Cir. 1982) .....	42, 44
<i>Jenkins v. Home Ins. Co.</i> , 635 F.2d 310 (4th Cir. 1980) .....	39
<i>Kaplan v. Int'l Alliance of Theatrical and Stage</i> <i>Employees and Motion Picture Mach. Operators of the</i> <i>United States and Canada</i> , 525 F.2d 1354 (9th Cir. 1975) .....	43
<i>Laffey v. Northwest Airlines, Inc.</i> , 567 F.2d 429 (D.C.Cir. 1976), cert. denied, 434 U.S. 1086, 98 S.Ct. 1281 (1978) .....	42
<i>Lawn v. United States</i> , 355 U.S. 339, 78 S.Ct. 311, reh'g denied, 355 U.S. 967, 78 S.Ct. 529 (1958) .....	41
<i>Liberles v. County of Cook</i> , 709 F.2d 1122 (7th Cir. 1983) .....	30
<i>Mapp v. Ohio</i> , 367 U.S. 643, 81 S.Ct. 1684 (1961) .....	11
<i>Milmark Services, Inc. v. United States</i> , 731 F.2d 855 (Fed. Cir. 1984) .....	2
<i>Probe v. State Teachers Retirement System</i> , 780 F.2d 776 (9th Cir.), cert. denied, — U.S. —, 106 S.Ct. 2891 (1986) .....	16, 25, 26, 27

## TABLE OF AUTHORITIES—(Continued)

Cases	Page
<i>Retired Public Employees Ass'n of California v. California</i> , 799 F.2d 511 (9th Cir. 1986) .....	25, 34
<i>Roberts v. North American Rockwell Corp.</i> , 650 F.2d 823 (6th Cir. 1981) .....	39
<i>Romero v. Union Pacific R.R.</i> , 615 F.2d 1303 (10th Cir. 1980) .....	43
<i>Schulte v. New York</i> , 533 F.Supp. 31 (E.D.N.Y. 1981) .....	40
<i>Shannon v. Hess Oil Virgin Islands Corp.</i> , 100 F.R.D. 327 (D.V.I. 1983) .....	42
<i>Shehadeh v. Chesapeake &amp; Potomac Telephone Co. of Maryland</i> , 595 F.2d 711 (D.C. Cir. 1978) .....	43
<i>Spirt v. Teachers Ins. and Annuity Ass'n</i> , 691 F.2d 1054 (2d Cir. 1982), <i>vacated</i> <i>and remanded</i> , 463 U.S. 1223, 103 S.Ct. 3565 (1983) ("Spirt I") .....	27
<i>Spirt v. Teachers Ins. and Annuity Ass'n</i> , 735 F.2d 23 (2d Cir.), <i>cert. denied</i> , 469 U.S. 881, 105 S.Ct. 247 (1984) ("Spirt II") .....	16, 27, 28
<i>Stewart v. CPC Int'l, Inc.</i> , 679 F.2d 117 (7th Cir. 1982) .....	39
<i>Terrell v. U.S. Pipe &amp; Foundry Co.</i> , 644 F.2d 1112 (5th Cir. 1981), <i>vacated and remanded on other grounds</i> , 456 U.S. 955, 102 S.Ct. 2028 (1982) .....	43

## TABLE OF AUTHORITIES—(Continued)

Cases	Page
<i>United Air Lines, Inc. v. Evans</i> , 431 U.S. 553, 97 S.Ct. 1885 (1977) .....	38, 39
<i>Young v. Klutznick</i> , 652 F.2d 617 (6th Cir. 1981), <i>cert. denied sub nom. Young v. Baldrige</i> , 455 U.S. 939, 102 S.Ct. 1430 (1982) .....	3
<i>Zipes v. Trans World Airlines, Inc.</i> , 455 U.S. 385, 102 S.Ct. 1127, <i>reh'g denied</i> , 456 U.S. 940, 102 S.Ct. 2001 (1982) .....	42, 44
<b>STATUTES</b>	
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, <i>et seq.</i> .....	<i>passim</i>
Florida Statutes:	
§ 121.021(24), (25) (1985) .....	3
§ 121.091 (1985) .....	3
<b>REGULATIONS</b>	
29 C.F.R. §1601.12(b) (1979) .....	43
<b>LEGISLATIVE HISTORY</b>	
Conference Report to the Equal Employment Opportunity Act of 1972, Pub.L.No. 92-261, 86 Stat. 103 (1972), <i>reprinted in</i> , 118 Cong.Rec. 7166, 7167 .....	39

---

CASE NO. 86-1685

---

in the  
**Supreme Court**  
of the  
**United States**

OCTOBER TERM, 1987

---

STATE OF FLORIDA, et al.,

*Petitioners,*

*vs.*

HUGHLAN LONG, S. Dewey Haas, and Carl Rassler,  
individually and on behalf of all retired and present male  
employees subject to the Florida Retirement System  
established by Chapter 121, Florida Statutes, as well as  
the surviving joint annuitants of any deceased retired male  
employees,

*Respondents.*

---

On Writ Of Certiorari To The United States  
Court Of Appeals for the Eleventh Circuit

---



## STATEMENT OF THE CASE

### A. Plaintiffs' Statement Of Facts Is A *Sub Silentio* Attack Upon The Findings By The District Court

This case is factually unique.

No other reported decision contains the express factual findings supported by abundant—indeed, overwhelming—evidence in the record, that the employer actually knew and acknowledged at and prior to the time of this Court's dispositive decision in *City of Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370 (1978), that Title VII did not permit an employer-operated pension plan to use sex-based mortality tables.

Further, no other reported decision contains the express factual finding, again supported by overwhelming evidence in the record, that this pension plan has the ability to satisfy the judgment awarded without causing any detrimental impact whatsoever upon the solvency of the fund or harm to innocent third parties.

At the outset, it is important to note that the employer has never challenged any of the district court's findings of fact as being "clearly erroneous". (See Petitioners Initial Brief of Appellants/Cross-Appellees at 1, 26). Yet, the employer persists in re-arguing to this Court—as it did in the Eleventh Circuit—certain unproven "facts" selected from the testimony of its own witnesses. This testimony is in derogation of the express findings made below and, obviously, (and properly) was rejected by the district court. The employer is bound by the district court's findings and cannot rely on other evidence to vary or contradict those findings<sup>1</sup>.

<sup>1</sup>*Cf. Millmark Services Inc. v. United States*, 731 F.2d 855, 859 (Fed. Cir. 1984) ("[I]t is apparent that appellant's position would require reversal of a number of factual determinations, and that, indeed, appellant seeks to have this court reexamine the record in its entirety and reevaluate

[FOOTNOTE CONTINUED ON NEXT PAGE]

### B. How The Florida Retirement System Functions

For purposes of Title VII, it has been stipulated that the State of Florida is the "employer" of the members of the plaintiff class and is authorized and charged under Florida law with the duty and responsibility of administering the Florida Retirement System ("FRS"). Also, it is stipulated that no third party unrelated to the employer is authorized to or does administer the FRS. (A. 39).<sup>2</sup>

The FRS is a defined benefit plan rather than a defined contribution plan. In a defined benefit plan, the employer defines the benefit an employee is to receive by reference to a formula which does not consider contributions made during the years of service of an employee. Under the Florida plan, benefits owed to retiring employees are calculated by reference to an average final compensation based upon the employees' average compensation for the best five out of the final ten years of employment. (A. 39); §121.021(24), (25), 121.091, Florida Statutes. By contrast, a defined contribution plan is one where contributions are made on behalf of and for the account of a specific employee during employment which, at the time of retirement, constitutes the sole source for funding his or her benefits. Since 1975 the FRS has been funded solely by the participating state and governmental employers. The amount funded is determined by the

(Footnote No. 1 continued)

factually each of the excuses for its default, requesting here, in effect, a trial *de novo* on the record. This is not the role or function of an appellate court."); *Young v. Klutznick*, 652 F.2d 617, 640 n.21 (6th Cir. 1981) (Keith, J., dissenting) ("It is disingenuous for the government to snipe at the district court's findings while claiming that it does not have to challenge them as clearly erroneous.") *cert. denied sub nom. Young v. Baldrige*, 455 U.S. 939, 102 S.Ct. 1430 (1982).

<sup>2</sup>Record references in this Brief are as follows: "J.A.\_\_\_\_" refers to the Joint Appendix at the page indicated; "A.\_\_\_\_" refers to the Appendix to Petition for Writ of Certiorari filed by Petitioner; "R.A.\_\_\_\_" refers to Respondents' Appendix filed in opposition to the Petition.

estimated costs of providing the benefits promised to retirees and is expressed as a percentage of gross payroll (the contribution rate). Adjustments to the contribution rate are expressed in "base" or "basis" points, with 100 basis points equal to one percentage point.

Prior to August 1, 1983 the FRS utilized separate mortality tables for males and females in calculating monthly retirement benefits for all employees. This use of sex distinct actuarial tables has resulted in lower monthly benefit payments to a male retiree and his spouse than to an otherwise identically situated female retiree and her spouse. While unisex tables were adopted for employees retiring on or after August 1, 1983, employees who retired prior to that time—including, particularly, subclass A members—continue to receive discriminatory benefits calculated under the sex-based tables, even as of this time.

#### C. What The Employer Knew About The Illegality Of Sex-Based Mortality Tables

The final order entered by the district court made several pointed express *factual* findings as to the employer's knowledge that it could not use sex-based mortality tables in its employee pension plan following this Court's *Manhart* decision:

The court will emphasize its finding of March 16, 1984, by saying that the state could not and *did not reasonably assume that it could continue to use the sex-based tables*. Order at p.14, document 2713.

*The state simply did not want to make the politically unpopular decision to reduce the females' benefits. The state chose instead to maintain the discriminatory status quo.*

\* \* \* \*

It is clear that the *defendants refused to act on the misplaced assumption that there would be no*

retroactive damage award. *Manhart* states, almost naively, that "there is no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision." *Id.* at 720, 721. Unfortunately, in Florida that prophecy has proved incorrect.

(A. 62, 65) (emphasis added).

These findings were based on ample evidence in the record and are not attacked by the employer as clearly erroneous. At trial, Plaintiffs' class proved that in November 1976—more than one and one-half years prior to *Manhart*—State Retirement Actuary Gibney wrote a memorandum to Division of Retirement Director Kennedy urging adoption of unisex mortality tables, recognizing even then that the payment of disparate benefits to males and females "under the guise of actuarial [e]quivalence" violated Title VII:

Because of the general thrust taken by the Equal Employment Opportunity Commission, *there is now a very strong possibility that actuaries will no longer be permitted to use mortality standards which provide for the use of a differentiation in rate of mortality by sex.*

\* \* \*

The EEOC's concern is that *when actuarial tables are sex-segregated this frequently results in the payment of different periodic pension benefits to males and females under the guise of 'actuarial Equivalence'.* Any such difference in benefits paid would constitute a violation of the Civil Rights Act of 1964, and thus the Commission requires that the periodic pension benefits paid to male and female employees in equivalent circumstances must be equal in amount.

\* \* \*



*I would not bring this to your attention if it were not for the pressure of the Federal government via the EEOC to have equal benefits without regard to sex. Since our option factors make this distinction, it would seem prudent to resolve our course of action before the 1977 valuation is started.*

*Recommendation:*

In light of the strong possibility of the Federal government mandating the use of such tables, I would recommend we consider going to the new basis for option reduction factors and resolve this differential in the benefits between the sexes once and for all.

(J.A. 230-35, Pl. Ex. 20, R. 21-112). (emphasis added).

Just after the April 25, 1978 *Manhart* decision, State Retirement Actuary Gibney wrote a memorandum dated May 19, 1978 to State Retirement Director Kennedy bluntly stating:

In light of the recent Supreme Court decision, it is not a question of 'if' but 'when' we adopt such [unisex] factors.

(J.A. 237-38, Pl. Ex. 21, R. 21-111-12). The reference was to *Manhart* as Mr. Gibney confirmed at trial. (J.A. 153-54). At trial, Mr. Gibney also admitted that following *Manhart*, the continued use of sex-based mortality tables was a "highly suspect" practice. (J.A. 160) (emphasis added). Similarly, State Retirement Director McMullian admitted that it was "stating the matter moderately" to say that a question existed after *Manhart* as to the use of sex-based mortality tables. (J.A. 82-83).

In a May 21, 1981 memorandum, Mr. Gibney recognized that if required by a court order to adopt unisex tables, the FRS could be required to pay retroactive damages back to

the date of *Manhart*. (R.A. 8, Pl. Ex. 25, R. 21-112). In a June 25, 1981 letter to an administrator of another state's pension plan, State Retirement Director McMullian expressly recognized that if the FRS "were forced to make retroactive adjustments [for failure to adopt unisex tables], the cost would be at least 3 times the amounts cited above, based on the number of years elapsed since April 1978." (J.A. 246-248, Pl. Ex. 40, R. 21-112) (emphasis added). Obviously, the reference to April 1978 was to the *Manhart* decision.

FRS administrators also sought and received opinions from their legal departments. In a July 10, 1981 memorandum from Division of Retirement Staff Attorney, Diane K. Kiesling to Director McMullian, prepared especially at his request, Ms. Kiesling stated that *Manhart* applied equally to discrimination at the pay-out stage as well as at the pay-in stage. (J.A. 180, Def. Ex. 16, R. 18-189). Ms. Kiesling further warned that unless unisex tables were immediately adopted there was substantial exposure to retroactive relief in the event of litigation such as this. (J.A. 181, Def. Ex. 16, R. 18-189).

David Kerns, then general counsel of the Department of Administration, similarly requested a legal opinion from Department Staff Attorney Samantha Boge who, in a September 1, 1981 memorandum, similarly concluded that the FRS violated Title VII under the controlling authority of *Manhart*:

Using sex-distinct actuarial tables resulting in higher monthly benefits for female retirees and their families than male retirees receive violates Title VII in my opinion, as surely as unequal monthly employee contributions. While such use may be permissible by insurers generally, it is not permissible by employers like the State of Florida.

(J.A. 178, Def. Ex. 14, R. 18-151 and 171). (emphasis added) Thus, it is clear that the district court's findings in this regard are well supported in the record. However, as in the Eleventh



Circuit, the employer devotes considerable attention to the officious, self-serving excuses offered by its own administrators to the effect that they discussed these issues privately among themselves and concluded *Manhart* somehow did not require any change in the FRS. The district court clearly could not and did not credit this after-the-fact interpretation of *Manhart* offered at trial. This is one example<sup>3</sup> of the employer's effort to retry their case *de novo* by arguing evidence contrary to the district court's findings as "fact". Such efforts should be disregarded.

**D. Why The FRS Has The Ability To Sustain The Relief Awarded Without A Detrimental Impact**

The district court held a final hearing over four days for the purpose of considering issues relating to the financial impact upon the FRS of an award of monetary relief. After hearing the evidence the district court found:

It is this court's opinion that *the fund has the ability to pay the judgment in this case without a detrimental impact* and that the harm will not fall on innocent third parties. *The judgment can be paid either by fund reserves or by an increase in the contribution rate.* If the latter, the burden will be borne by the employers for whom the plaintiffs worked. If the former, the evidence demonstrates that there are sufficient cash reserves and that the fund would not be bankrupted.

(A. 68) (emphasis added). The district court found that the contribution rate adopted by the 1984 Florida Legislature was 24 basis points (.24%) higher than the rate necessary to keep the FRS adequately funded and thus, would necessarily

<sup>3</sup>Another example is the employer's reference to the disposition of certain charges by the United States Department of Health Education and Welfare for the proposition they did not know *Manhart* required any change in the FRS. (Petitioners' Brief at 15-16, 27).

generate "excess cash" into the fund with which to satisfy this award. (A. 67-68). As the Eleventh Circuit noted, the district court thereby found that this plan would generate a surplus of more than \$200 million<sup>4</sup> over and above what was necessary for the FRS to satisfy all its obligations. 805 F.2d at 1550-51.

The employer's chief response to this finding is to attempt to introduce into this record purported factual matters occurring after this trial and which were never brought before the district court. In an affidavit filed with the Eleventh Circuit in support of a motion to stay the judgment, the employer asserted that in April 1986 the Florida Legislature adopted new contribution rates 90 basis points higher than the 1984 rate (which included the extra 24 basis points) and that the Legislature concluded these additional 90 basis points were required to maintain proper actuarial funding, even taking into consideration the pre-existing 24 basis point surplus! Clearly, nothing in the enactment of 90 additional basis points logically suggests abandonment of the prior additional basis points. If it means anything, it may mean that the district court's projection that the FRS is receiving some \$216 million in "excess cash" should be revised upward. The "excess cash" now appears to be more than \$810 million. In any event, however, injecting these alleged "facts" is patently improper for the reasons previously stated.

Even if the employer's bizarre interpretation of these new 90 basis points is accepted, however, it does not support the premise that there are insufficient funds to satisfy this award without a detrimental impact on the pension fund. Accepting, *arguendo*, the employer's argument that these 24 points were only in effect for two years and that one basis point generates \$700 to \$800 thousand per year, the actual cash generated

<sup>4</sup>The present value of one basis point is approximately \$9 million. (A.56). By simple arithmetic \$9 million times 24 basis points equals \$216 million.

during this period comes to \$33.6 to \$38.4 million, compared with the \$43.6 million of the judgment. Thus, even by the employer's own "simple arithmetic" the question is reduced to the ability of a fund with over \$10 billion in assets to satisfy a "residual" of \$5-\$10 million, which it clearly can do. This "residual" is the equivalent of about one basis point (\$9 million) and probably less. Retirement Director McMullian admitted that amounts less than one basis point (i.e., where the value reaches \$9 million) are not significant to the financial planning of this fund. (J.A. 84). Thus, because this residual is at or less than the dollar value of one basis point it is not a significant amount, let alone devastating, to the FRS.

The employer also attempts to imply that these funds are somehow not available because they were applied to further reduce the FRS's existing debt.<sup>5</sup> There is nothing convincing about this self-serving bookkeeping entry which makes \$33 to \$38 million vanish. Certainly, the trial court was not convinced. The employer's own statement made in an FRS bulletin when this increase was adopted was that its purpose was "to guard against *unexpected increases* in the UAAL." (J.A. 199, Pl. Ex. 13, R. 21-112) (emphasis added). The \$216 million to be generated compares too neatly with the maximum relief of \$201 million<sup>6</sup> sought by the Plaintiff class.

---

<sup>5</sup>The "UAAL"—Unfunded Accrued Actuarial Liability—is a debt and is being paid off over time by contributions which far exceed the present cash flow needs of the fund and will eventually be reduced to zero.

<sup>6</sup>Plaintiffs' class argued below and to this Court that the employer was precluded from raising any equitable defenses because its conduct, as expressly found by the district court, constituted "bad faith", defined in *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 422, 95 S.Ct. 2362, 2374 (1975), as "maintaining a practice which he know to be illegal or of highly questionable legality." The class further urged that the relief awarded did not make them "whole" because males' benefits were raised only to the "unisex" level while similarly situated females remain at the higher

[FOOTNOTE CONTINUED ON NEXT PAGE]

to be mere coincidence. It is rather obvious that this employer "hedged its bet" by pre-funding its liability for "unexpected increases" in its debts to its retirees.

Alternatively, the district court further found that if necessary the FRS has the ability to raise the funds to pay this judgment by an increase in the contribution rate without harm to innocent third parties. (A. 68). In so ruling, the district court clearly rejected the testimony of the employer's so-called expert, Dr. James McClave, upon whose testimony the employer so heavily relies, that all Florida governmental entities were in such dire financial straits, any additional costs would be crippling. (A. 57). This is another example of the employer's reliance on its own testimony in derogation of the district court's express findings. As stated, such arguments are not entitled to consideration by this Court.

Thus, as the district court found, the FRS has the ability to pay this judgment either from fund reserves or through an increase in contribution rates without detrimental impact or harm to innocent third parties. Despite the employer's arguments, that is the unalterable *fact* of this case.

#### E. Why Proration Was Rejected

The district court rejected the employer's contention that any relief awarded should be "prorated". First, and most importantly, the district court found that proration was not appropriate because of the "mechanics" of the FRS. As noted,

---

(Footnote No. 6 continued)

"female" benefit rate, thus conflicting with the most basic precept of Title VII—equality. The class further argued that it was error to deny retroactive relief to class members who retired prior to *Manhart*. This would have brought the relief awarded to \$201 million. Plaintiffs' class Petition for Writ of Certiorari to review these issues was denied, however, this Court is empowered to address them as part of its disposition of this case if justice should so require. See *Mapp v. Ohio*, 367 U.S. 643, 646 n.3, 81 S.Ct. 1684, 1686 n.3 (1961).



the FRS is a defined benefit, as opposed to a defined contribution plan. An individual employee's benefits are determined at the time of retirement by reference to a formula which calculates an average final compensation based on that employee's five highest-paying years out of the final ten years of employment.

In direct conflict with the district court's findings, the employer argues that there is in this defined benefit plan the same direct correlation between contributions and benefits as exists in a defined contribution plan. The argument was rejected because it was patently illogical. In a defined contribution plan—unlike the FRS plan—specific contributions are accumulated for the account of specific employees which, together with investment earnings thereon, constitutes a fixed, discrete amount at the time of retirement from which to determine and fund monthly retirement benefits. (J.A. 93). In a defined benefit plan there is no specific accumulation of contributions for any single employee upon which to calculate benefits; rather, benefits are calculated solely by reference to a formula in which contributions attributable to that employee's salary are not considered at all. (A. 39). For these reasons, proration of relief by reference to contributions or the accrual of benefits was found to make no sense in the context of this plan.

The employer also inaccurately argues that contributions to fund an employee's benefits terminate as of the date of that employee's retirement. As stated, in the defined contribution plan an employee's benefits are fully funded at the time of retirement and no further contributions are thereafter made on that employee's behalf. (J.A. 93). In this defined benefit plan, however, contributions fund the plan *as a whole*, including obligations to both current employees and to retired employees. (J.A. 92). Adjustments are made periodically to the contribution rates based upon actuarial evaluations of the plan's future obligations, resources and needs *as a whole*. (J.A. 92). Current and future contributions

therefore necessarily fund benefits to be paid to those already retired.

Second, the district court noted that the argument was inconsistent with the employer's own actions in that no such proration was done when the FRS converted to unisex mortality tables in 1983. (A. 65). Third, the district court further noted that the employer's actuarial expert at trial did not vouch for the application of proration under these circumstances but rather, merely demonstrated how the calculations could be made. (A. 6566; J.A. 114).

#### **F. How The Parameters Of Plaintiffs' Class Were Established And How Notice Of Its EEOC Charges Was Given**

The facts asserted by the employer in support of its attack on the parameters of the class and the viability of the Plaintiff Class Representatives have largely been waived because they were not made when these issues were resolved on summary judgment. These issues were not before the district court at the time of the final hearing. The only issues tried before the district court in the final hearing concerned the impact of an award of damages on the FRS fund and the employer's entitlement to assert this impact defense at all in light of the "bad faith" issue raised by Plaintiffs. (A. 38). Thus, although the employer was permitted (over objection) to offer evidence on class parameter issues, the evidence was superfluous because these issues were long since settled and should not be considered in reviewing these issues in this proceeding.

The parties stipulated to the certification of this cause as a class action pursuant to the Plaintiffs' definition of the class as set forth in their complaint on September 27, 1982. (R. 4-55-1 to 2, 4 to 5, 7). The complaint specifically alleges that the violation of Title VII was the payment of smaller monthly retirement benefits to males than to similarly situated females. (R. 4-55-7 at paragraphs 17-18). The



stipulation was approved by the Court on January 20, 1983, and the class thereafter remained unchanged, except to divide the members into two sub-classes. (R. 4-56-1; 15-2713-3 to 4). There was no contention at the time the stipulation was made and approved that the class should be limited to persons *retiring* (as opposed to receiving benefits) within 300 days preceeding Class Representative Hughlan Long's EEOC charge.

Similarly, when the appropriate date from which the two year retroactive relief period should run was decided by the trial court, there was no issue raised as to whether Mr. Rassler's original charges were timely or whether Mr. Samaha's charges could be considered at all. The only issue raised by the employer was whether it had notice of Mr. Samaha and Mr. Rassler's original charges or whether the August, 1981 amended charges were the first operative notices. (R. 8-2773-5 to 6).

On December 27, 1979, Class Member N. Louis Samaha filed a charge of discrimination before the Equal Employment Opportunity Commission ("EEOC") naming his immediate employer, the Pinellas County Board of Public Instruction, as the respondent. The charge expressly stated "Under the Florida Retirement System, I am presently receiving a lesser benefit than female retirees under similar circumstances (36 yrs. of experience)" (R. 8-2740-1). The charge went on to state, under the heading "Class Allegation", "I allege that the Florida Retirement System discriminates against males as a class in the provision of retirement benefits." *Id.* An amended charge was filed on August 24, 1984 which named the FRS as a respondent but did not otherwise change the substance of the allegations.

Class Representative Carl Rassler filed a charge of discrimination with the EEOC on May 15, 1980 naming his immediate employer, the Hillsborough County School Board, as the respondent. That charge stated, "As a condition of my

employment, I was required to participate in a Retirement System administered by the Division of Retirement of the State of Florida which pays me less monthly benefits than it pays females with the same years service and the same average salary." (R. 8-2737-6). The amended charge filed August 24, 1981 named the State of Florida, Department of Administration as the respondent (R. 8-2737-7). The description of the basis of the claim was the same but for the addition of a single sentence. *Id.* Mr. Rassler was not an original named plaintiff when this suit was filed but was permitted to intervene as a class representative by the district court by Order dated March 15, 1984. (A. 73).

### SUMMARY OF THE ARGUMENT

The employer's liability in this case flows directly and exclusively from this Court's decision in *City of Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370 (1978) and not its subsequent decision in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492 (1983). Because the Florida plan was employer-administered, without the involvement of a third party insurer, the unanticipated and unforeseeable rule of law announced in *Norris* is completely inapplicable in this case and does not justify the denial of retroactive damages.

FRS administrators recognized that the *Manhart* decision precluded the use of sex-based tables in the FRS, but refused to convert to unisex tables because they did not want to make the politically unpopular decision to reduce females' benefits and did not believe they would face retroactive liability, although they did acknowledge the potential.

Moreover, the FRS was found to have excess cash reserves with which to pay this judgment and/or has the ability to raise sufficient funds through an increase in the contribution rate. Thus, the district court found the relief awarded will not devastate the FRS or harm innocent third parties. The

*Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362 (1975) presumption in favor of retroactive damages therefore requires an award of relief retroactive to the date of *Manhart*.

*Probe v. State Teachers Retirement System*, 780 F.2d 776 (9th Cir.) cert. denied, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 2981 (1986), and *Spirit v. Teachers Ins. and Annuity Ass'n*, 735 F.2d 23 (2d Cir.) ("*Spirit II*"), cert. denied, 469 U.S. 881, 105 S.Ct. 247 (1984), do not compel a different result. *Probe* is both factually inapplicable and its interpretation of *Norris* is fundamentally flawed because it fails to recognize that the *Norris* ruling only applies to employee plans which are administered by third party insurance companies selected by the employer rather than administered directly by the employer.

To the extent *Spirit II* purports to hold that *Norris* generally precludes a retroactive relief, it must be recognized that the plan at issue in that case, like the plan in *Norris*, was administered by a third party and not directly by the employer. However, its interpretation of *Norris* as precluding the slightest additional burden is wrong.

Proration—the limitation of relief to benefits attributable to contributions made after a date certain—has no application to this case either as a matter of law or of fact. Because this plan operates as a defined benefit plan, there is no direct correlation between contributions paid in and benefits paid out to each employee. For this reason, proration is inapplicable to the mechanics of this plan. Moreover, the employer's evidence did not demonstrate that proration was applicable. The employer's own expert witness would not testify that it *should* be applied in this case, only that it *could* be. In fact, when the FRS finally adopted unisex actuarial tables in 1983 for its existing employees, it did not make any proration of benefits. Furthermore, the FRS has ample cash reserves which extinguishes any equitable concern about proration.

The EEOC charges filed by Class Representative Carl Rassler on May 15, 1980 and by class member N. Louis

Samaha on December 27, 1979 were both timely filed and sufficient predicates for this Title VII suit. Because the employer's conduct constitutes continuing discrimination, the EEOC charges could be filed at any time. Moreover, for this same reason, the class properly includes everyone who received an unequal retirement benefit check during the 300-day period preceding the EEOC filing and not just those persons who began retirement at that time. Finally, there is no support for the contention that this 300-day period should be calculated from the date of filing of the federal court complaint rather than the EEOC charge; indeed, the argument was never previously made and is contrary to all case law.

In addition, it was entirely proper for the trial court to fix the two-year back pay period by reference to Mr. Samaha's EEOC filing even though he is not a named Plaintiff because in this class suit the purposes of the EEOC filing were fulfilled. Finally, because the original EEOC charges of Mr. Rassler and Mr. Samaha specifically referenced the Florida Retirement System and described the same exact discriminatory conduct alleged in this suit, those charges are completely proper predicates for this suit. In any event, the employer's stipulations and failure to raise these objections when the issue was decided but rather, not until the eve of trial, constitute a waiver of its right to do so now.

## ARGUMENT

### I. SUPREME COURT CASELAW COMPELS AN AWARD OF RETROACTIVE RELIEF IN THIS CASE

#### A. Introduction

The employer does not deny that its continued payment of smaller monthly retirement benefits to men than to women due to use of sex-based mortality tables constitutes illegal sex discrimination under Title VII. Yet, despite this, the employer argues that it is not obligated to pay damages for



this past disparity in benefits nor is it obligated to discontinue this practice in the future.

This employer's rather remarkable argument is based upon the notion, rejected below, that it could not and did not know that the Florida plan was illegal based upon this Court's 1978 decision in *City of Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370 (1978). Instead, it contends that the 1983 decision in *Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492 (1983), was its first such notice. The employer further argues that *Norris* lays down a *per se* rule of law for all pension cases that persons who retired prior to August 1, 1983 can never recover retroactive damages in a Title VII case. As demonstrated below, these arguments are premised on erroneous and often preposterous interpretations of *Manhart* and *Norris*, and are totally without merit.

In order to promote some judicial interest in its legal argument, the employer argues that this Court should excuse it from financial responsibility for its own misconduct because this somehow might result in other plans also facing liability. The argument provides no principled basis upon which to excuse the employer's knowing violation of Title VII. *If other plans similarly failed to follow what they knew to be the law and have the ability to remedy the discrimination without jeopardizing the retirement benefits of innocent third parties, there is no reason whatsoever why they should not be required to do so.* Pension plans are not above the law, and it is disingenuous for the employer to make this effort to divert attention from its own misconduct through such "*in terrorrem*" tactics.

#### B. *Manhart* And *Norris*

In *Manhart*, the employer required females to make larger contributions to the employee pension plan than were required of males in order to receive the same benefits. This

Court held it was illegal under Title VII for an employer to make this differentiation among its employees. The *Manhart* Court pointed out that the focus of Title VII is equal treatment of the *individual* and that all individuals do not share the characteristics of their sexual class as to life expectancy; i.e. some men live longer than some women. These sex-based mortality tables differentiated between men and women due to class wide assumptions based on sex and, therefore, violated Title VII. 435 U.S. at 705-06, 98 S.Ct. at 1374.

Despite finding that this use of sex-based mortality tables violated Title VII, the *Manhart* Court concluded that it would be inequitable and inappropriate to award monetary relief to the class. First, the Court reasoned that prior to its ruling "conscientious and intelligent administrators of pension funds" could reasonably have assumed that the use of these tables was lawful. 435 U.S. at 720, 98 S.Ct. at 1381. Thus, the decision represented a new and unforeseeable interpretation and application of law.

Second, *Manhart* also expressed concern that the "potential impact" resulting from this new and unforeseeable interpretation and application of law could devastate a pension plan by jeopardizing its solvency so that it would be financially unable to pay benefits to innocent retirees. 435 U.S. at 721-23, 98 S.Ct. 1382-83.

In rendering this decision, the *Manhart* Court emphasized that its ruling applied only in the employment context, stating:

Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her contributions could command on the open market.

435 U.S. at 717-18, 98 S.Ct. at 1380. In a footnote to this statement, the Court noted the basic legal truism that "Title



VII and the Equal Pay Act primarily govern relations between employees and their employer, not between employees and third parties." *Id.* at n. 33.

This Court's decision five years later in *Norris*—which the employer argues was its first notice of the FRS plan's illegality—turned on an issue which has *no application* to the FRS. In *Norris*, this Court was presented with the issue whether the *Manhart* "open market" exception permitted an employer to select a third party insurance company which in turn offered pension plans providing disparate benefits to identically situated men and women due to the use of sex-based mortality tables. In a plurality opinion, the "liability majority"<sup>7</sup> held that an employer still violated Title VII where the discriminatory plan was administered by the third party insurance company selected by the employer. In so ruling, the Court dealt summarily with the issue of whether *Manhart's* rationale applied to the payment of unequal benefits, stating:

We have no hesitation in holding, as have all but one of the lower courts that have considered the question, that the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage.

\* \* \*

This underlying assumption—that sex may properly be used to predict longevity—is flatly inconsistent with the basic teaching of *Manhart*: that Title VII requires employees to treat their employees as *individuals*, not 'as simply components of a racial, religious, sexual or national class.'

<sup>7</sup>Justice Marshall, joined by Justices Brennan, White and Stevens, with Justice O'Connor concurring separately.

*Norris*, 463 U.S. at 1081-83, 103 S.Ct. at 3497-98 (citation omitted). Justice O'Connor, concurring with the liability majority, similarly concluded: "Ultimately, I find this case controlled by the same principles of Title VII law articulated by the Court in *Manhart*." 463 U.S. at 1109, 103 S.Ct. at 3512.

The *Norris* liability majority also dealt summarily with the contention that the Arizona plan did not violate Title VII because it included non-discriminatory optional benefits along with the sexually discriminatory optional benefits:

It is likewise *irrelevant* that the Arizona plan includes two options—the lump sum option and the fixed-sum-for-a-fixed-period option—that are provided on equal terms to men and women. An employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis. *Cf. Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-24 n. 8, 102 S.Ct. 3331, 3336 n. 8, 73 L.Ed.2d 1090 (1982).

463 U.S. at 1082 n. 10, 103 S.Ct. at 3498 n. 10 (emphasis added). Having thus determined that the Arizona plan "plainly would have violated Title VII" if it had been run by the employer itself, 463 U.S. at 1086, 103 S.Ct. at 3500 (emphasis added), the liability majority concluded that the employer did not avoid Title VII liability by having the plan administered by an employer-selected third party insurance company.

However, a different "damages majority"<sup>8</sup> held that it was inappropriate to award relief because the employer could reasonably have believed the *Manhart* "open market" exception permitted the use of sex-based mortality tables where the plan was administered, not by the employer itself, but by the third party selected by the employer:

<sup>8</sup>Justice Powell, joined by Chief Justice Burger and Justices Blackmun and Rehnquist, with Justice O'Connor concurring separately.

*Manhart* did put all employer-operated pension funds on notice that they could not "requir[e] that men and women make unequal contributions to [the] fund," *id.*, at 717, 98 S.Ct., at 1380, but it expressly confirmed that an employer could set aside equal contributions and let each retiree purchase whatever benefit his or her contributions could command on the "open market," *id.*, at 718, 98 S.Ct., at 1380. Given this explicit limitation, an employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market.

*Norris*, 463 U.S. at 1106, 103 S.Ct. at 3510 (emphasis added). See also, 463 U.S. at 1107, 103 S.Ct. at 3511 (retroactive relief held inappropriate "particularly in view of the question left open in *Manhart* . . ."). Similarly, Justice O'Connor, concurring with this portion of the damages majority opinion, wrote:

I see no reason to believe that a retroactive holding is necessary to ensure that pension plan administrators, who may have thought until our decision today that Title VII did not extend to plans involving third-party insurers, will not now quickly conform their plans to insure that individual employees are allowed equal monthly benefits regardless of sex.

463 U.S. 1110, 103 S.Ct. 3512 (emphasis added).

The employer's "analysis" of *Manhart* is, at best, superficial. *Manhart* did not simply hold that Title VII prohibited the collection of unequal contributions from male and female employees, as the employer contends. (Petitioners' Brief at 29). Such an interpretation focuses only on the *Manhart* result dictated by the specific factual circumstances of that case and utterly ignores the Court's stated rationale

that sex-based tables violate Title VII because they indulge class-wide stereotypes that are not necessarily true for the individual.

This rationale was clearly applicable to the FRS' practice of paying disparate benefits to men and women because of their sex through use of sex-based mortality tables. *Norris* itself, together with virtually all other courts which had then considered this question, held there was no meaningful distinction between such discrimination at the "pay in" (contribution) stage and at the "pay out" (benefit) stage. *Norris*, 463 U.S. at 1081, 103 S.Ct. at 3497-98.

The employer also errs in arguing that the "sole reason retroactive relief was denied in *Manhart* . . . was this Court's concern . . . with the impact . . . on pension plans throughout the United States." (Petitioners' Brief at 25-26, emphasis added). While such a concern was certainly expressed, it arose as a consequence of the application of what then was a new, unforeseeable and unanticipated interpretation of law. But for a sharp departure from prior law, financial impact is not unanticipated and does not become a concern or a basis for the denial of retroactive relief. Cf. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-109, 92 S.Ct. 349, 354-356 (1971) (cited in *Norris*, 463 U.S. at 1109, 103 S.Ct. at 3512 (O'Connor, J. concurring)). The failure to anticipate the application of established law should never be accepted as an excuse for a Title VII violation.

The employer contends that *Norris* did not turn on the issue of whether the *Manhart* "open market" exception permitted an employer to select a third party insurer which offered an employee pension plan utilizing sex-based tables. This is absurd. It was this portion of the *Norris* holding, and only this portion, that was deemed to be a new and unforeseeable interpretation of law warranting the denial of retroactive relief. See *EEOC v. Texas Industries, Inc.*, 782 F.2d 547, 551 (5th Cir. 1986); *Graham v. State of New York Dep't of Civil Service*, 653 F.Supp 1363, 1367-68 (S.D.N.Y. 1987) appeal pending.



Thus, *Norris* does not apply to the FRS because the FRS plan was *never* administered by anyone other than this employer itself. Indeed, to accept the employer's argument renders *Manhart* a complete nullity. If it is only *Norris* that constitutes notice to *all* plans, then *Manhart* would have no effect as to *any* plan. Clearly, *Norris* cannot be read to stand for such an anomalous proposition. Thus, as a matter of law it is *Manhart* and not *Norris* which determined the illegality of the FRS.

Perhaps more importantly, however, the proof in this case also established as a matter of *fact* that FRS administrators actually knew *Manhart* controlled and acknowledged the likelihood of retroactive damages. The employer's own internal memoranda expressly acknowledged that *Manhart* required the FRS to convert to unisex tables (J.A. 237, Pl. Ex. 21, R. 21-111-12), that *Manhart* applied to unequal benefits as well as to unequal contributions (J.A. 237, 180, 178, Pl. Ex. 21, R. 21-111-12; Def. Ex. 16, R. 18-189; Def. Ex. 14, R. 18-151 and 171), that while *Manhart* allowed insurers generally to use sex-based mortality tables, such use was not permissible by employers such as the State of Florida (J.A. 178, Def. Ex. 14, R. 18-151 and 171), and the prospect of retroactive liability to the date of *Manhart* (J.A. 8, 180, 246-48; R.A. 8, Pl. Ex. 16, R. 18-189; Pl. Ex. 40, R. 21-112; Pl. Ex. 25, R. 21-112). These unimpeachable documents totally refute the belated claim of innocent ignorance now proffered by the employer in this Court.

From the evidence adduced, the district court below expressly found that FRS administrators actually understood "from the date of *Manhart* that the use of sex-based mortality tables was impermissible" and that they "could not and did not reasonably assume [they] could continue to use the sex-based tables." (A. 62). The district court further found that FRS administrators "refused to act" because they "did not want to make the politically unpopular decision to reduce the females' benefits" and because of a "misplaced

assumption there would be no retroactive damages award." (A. 62-65). Thus, unlike *Norris*, in this case it is not necessary to speculate about what some theoretical "conscientious pension plan administrator" might or might not have reasonably thought was lawful. The evidence at hand shows what these "not-so-conscientious pension plan administrators" were thinking. There is no equitable basis for a concern in this case about the impact of an unforeseeable interpretation of law. Here, the impact was anticipated and foreseen. *Manhart* clearly applied to this plan and the employer knew it.

### C. *Probe*

The employer relies heavily upon *Probe v. State Teachers Retirement System*, 780 F.2d 776 (9th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2891 (1986),<sup>9</sup> in support of its interpretation of *Norris* as foreclosing relief to pre-August 1, 1983 retirees. Whether erroneous or not, *Probe* does not compel the denial of any relief in this case. Citing *Norris*, *Probe* noted that retroactive relief may be denied where "an employer was not on notice by prior judicial decisions that its pension program was unlawful." 780 F.2d at 782. The *Probe* court then held that it was *Norris*, and not *Manhart*, which put that employer on notice that its plan was illegal. 780 F.2d at 782-83 (emphasis added).

The employer's reliance on *Probe* is very clearly misplaced for two reasons. First, *Probe* is factually inapposite to this case. As stated previously, in this case it is not necessary to speculate about what a pension plan administrator might reasonably have thought was lawful. This employer knew that the FRS was controlled by *Manhart* as soon as that decision was rendered and it maintained that understanding consistently thereafter (until brought into court).

<sup>9</sup>The Ninth Circuit's subsequent decision in *Retired Public Employees Ass'n of California v. California*, 799 F.2d 511 (9th Cir. 1986), did not independently analyze these issues but rather, deemed *Probe* "dispositive." *Id.* at 515.



Second, Plaintiffs' class respectfully submits that *Probe's* analysis and interpretation of *Norris* is fundamentally erroneous as the district court and the Eleventh Circuit concluded. *Probe* interprets *Norris* as holding that under the *Manhart* "open market" exception, an employer administered plan "reasonably could have assumed that it was lawful to provide an optional annuity system that reflected plans offered by insurance companies on the open market" and for this reason denied retroactive relief. *Probe*, 780 F.2d at 782-83 (emphasis added). However, as discussed earlier, this was not the holding of *Norris*. *Norris* was not concerned with how the benefits offered compared to open market plans. The determinative issue was whether the actual intervention of this third party insurance company between the employer and the employee removed the discriminatory plan from the employment context limitations of Title VII. *Probe* simply fails to recognize this as the critical issue decided in *Norris*. Based upon this erroneous interpretation of *Norris*, *Probe* found *Norris* controlling and denied retroactive relief even though the STRS plan was employer administered, without the involvement of any third party.<sup>10</sup>

The error of the *Probe* conclusion is also demonstrated when read in conjunction with *Manhart*. *Probe* says, in effect, that pension plans reasonably could have believed during the period following *Manhart* and before *Norris* that it was all right to offer different benefits to men and women so long as the benefits "reflected plans offered by insurance companies on the open market." Under this reasoning *Manhart* is a complete nullity since the *Manhart* plan itself was based upon the same sex segregated actuarial tables used in the insurance industry generally. The plan at issue in

<sup>10</sup>Amici suggest that *Probe*, in spite of its deafening silence on this issue, "made clear [that] *Manhart* and the cases interpreting it did not limit the 'open market' exception to those employers who retained third party insurers to provide their pension benefits." (Brief of Amici Curiae at 15 n. 7). The briefs to the *Probe* court did not raise this issue (R.18-2923-28 through 30) and, consequently the opinion never considers this distinction.

*Manhart* thus "reflected" plans available on the open market. If *Probe's* analysis of *Norris* were correct, there would have been no finding of a violation of Title VII in *Manhart*. The fact that the *Manhart* plan was held to violate Title VII completely repudiates *Probe's* reasoning and its interpretation of *Norris*.

#### D. *Spirit II*

For similar reasons, Defendants' reliance on *Spirit v. Teachers Ins. and Annuity Ass'n*, 735 F.2d 23 (2d Cir.), cert. denied, 469 U.S. 881, 105 S.Ct. 247 (1984) ("*Spirit II*"), for its interpretation of *Norris* as precluding an award of retroactive benefits attributable to pre-*Norris* contributions is also misplaced. The employer cites *Spirit II* for the proposition that the question is not one of whether a devastating financial impact would occur but rather, whether even the slightest additional financial burden on the pension plan would occur.<sup>11</sup> In fact, *Spirit II* cannot properly be construed as supporting this proposition and, to whatever extent it does, it is clearly incorrect.

The *Spirit II* analysis of *Norris* may be consistent with *Manhart* and *Norris* if confined to the plan there at issue. The plan involved in *Spirit II*—like the plan in *Norris*—was not administered directly by the employer but rather was administered by a semi-independent third party entity.<sup>12</sup> Under those circumstances, the *Spirit II* Court correctly applied *Norris* to the facts of the case before it. However, that discussion has no relevance to an employer administered plan

<sup>11</sup>Under the facts of this case, there is no impact at all on this plan given the trial court's finding that the FRS will have \$216 million in "excess cash" with which to satisfy the award of \$43.6 million damages in this case.

<sup>12</sup>The TIAA-CREF plan involved is described in *Spirit v. Teachers Ins. and Annuity Ass'n*, 691 F.2d 1054, 1057 (2d Cir. 1982) ("*Spirit I*"), vacated and remanded, 463 U.S. 1223, 103 S.Ct. 3565 (1983).

such as the FRS. *Spirt II* no more controls this matter than does Norris itself.<sup>13</sup>

Moreover *Spirt II* misinterprets the financial impact concern voiced in both the *Norris* and *Manhart* opinions. In *Manhart*, the Court spoke in terms of "jeopardiz[ing] the insurer's solvency" and "devastating" a pension fund so that it would be unable to meet its basic obligation to provide pension benefits to participants. 435 U.S. at 721, 98 S.Ct. at 1382-1383. This same language was quoted in *Norris*, 463 U.S. at 1092, 103 S.Ct. at 3503. *Accord EEOC v. Atlanta Gaslight Co.*, 751 F.2d 1188, 1198 (11th Cir.), *cert. denied*, 474 U.S. 968, 106 S.Ct. 333 (1985). Neither *Manhart* nor *Norris* state that retroactivity is prohibited if such relief would impose any additional burden on a pension fund, however slight. In this respect, the reasoning in *Spirt II* is erroneous.

#### E. Retroactive Relief Is Required

In order to effectuate the remedial purposes of Title VII, Congress specifically gave the federal district courts broad, discretionary equitable powers "to fashion such relief as the particular circumstances of a case may require to effect restitution." *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 764, 96 S.Ct. 1251, 1264 (1976). Moreover, as this Court has reiterated time and time again, retroactive relief is so essential to furthering the purposes of Title VII that there exists a "presumption in favor of retroactive liability" in Title VII cases which "can seldom be overcome." *Manhart*,

<sup>13</sup>Thus, contrary to the employer's contention, the decision of the Eleventh Circuit below does not conflict with *Spirt II*. In fact, the Eleventh Circuit cited *Spirt II* as support for its decision. 805 F.2d at 1549. The employer's contention that if this case had been decided in the Second Circuit there would not have been an award of relief also fails. Similar if not greater relief was awarded on similar facts and upon the same interpretation of law in *Graham v. State of New York Dep't of Civil Service*, 653 F.Supp. 1363 (S.D.N.Y. 1987) *appeal pending*.

435 U.S. at 719, 98 S.Ct. at 1381, *citing, Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362 (1975); *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 364-65, 97 S.Ct. 1843, 1869 (1977). A district court's award (or denial) of relief should only be overturned if, under these standards, it constitutes an abuse of discretion. *Cf. Norris*, 463 U.S. at 1105, 103 S.Ct. at 3510.

The reason for the denial of retroactive relief in both *Manhart* and *Norris* was this Court's perception that the new and unexpected rule of law would have an unanticipated, devastating impact on the pension fund. In each case, this Court expressed concern for the resulting potential for disruption or elimination of benefits to retirees who planned to rely on their pensions to sustain themselves in their later non-working years; obviously, an undesirable result. This Court concluded that under such extreme circumstances, the equities were sufficient to override the *Albermarle* presumption of retroactive relief, and that it had been an abuse of the district courts' discretion to award monetary relief. It follows, however, that if there is no new principle of law, there can be no unanticipated financial impact; the application of established law should never be regarded as unanticipated. Thus, on this basis alone, the employer was not even entitled to argue the issue of impact.

However, the district court below did consider the issue and specifically found, as a factual matter, that this employer's pension fund would not sustain an adverse financial impact that would jeopardize the solvency of the plan or harm innocent third parties. *No present or future retiree will lose any benefits as a result of the relief granted to these victims of discrimination.*

By the employer's own admission, as of 1986 the 24 additional basis points adopted in 1984 generated \$38.4 million of the \$43.6 million needed to satisfy this judgment, and the remaining balance is not "significant" to this plan. More importantly, the district court's express finding that



these 24 basis points will generate \$216 million in "excess cash" over and above the funding necessary to maintain the plan has not been challenged as clearly erroneous and is, therefore, binding and conclusive for this case. The employer's only contrary arguments are made on the basis of alleged events occurring subsequent to the trial which are not properly part of the record for this purpose and which, in any event, do not support the proposition that these 24 basis points no longer generate this excess cash. See pages 9-10, *supra*. In sum, the employer does not state any basis to disturb the district court's finding that the FRS has sufficient excess cash reserves to satisfy this judgment without a detrimental impact.

Moreover, the fact that public funds may be needed to make whole government employees injured by employment discrimination is in and of itself no basis upon which to deny relief. In *Liberles v. County of Cook*, 709 F.2d 1122, 1136 (7th Cir. 1983), the court rejected this argument stating:

Defendants' only argument against the award is that it is expensive and will hurt taxpayers. Obviously, such a reason if applied generally would frustrate the statutory purpose of . . . Title VII by sending a clear message to state and local governments that they may discriminate against their employees, in violation of Title VII, and incur no financial liability.

*Id.* (emphasis added). Accord *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 632 (5th Cir. 1983). It would directly contravene the intent of Congress, in amending Title VII to specifically extend to state and local governmental employees, to deny monetary relief merely because it would ultimately be paid by taxpayers.

While both *Manhart* and *Norris* expressed concern about imposing additional financial obligations on what were perceived in a general sense as financially troubled state and

local governments, those concerns have been alleviated in this case. The district court received evidence on this precise issue and found that this judgment could be sustained through an increase in the contribution rate charged to the employer "without a detrimental impact [or] harm to innocent third parties."<sup>14</sup>

Given the degree of discretion allowed the district court in fixing relief and given the presumption in favor of retroactivity which can seldom be overcome, no justification exists for disturbing this judgment and clearly none has been demonstrated by the employer.<sup>15</sup> The legal analysis and factual findings both establish beyond question that *Manhart* determined the illegality of the FRS' use of sex-based mortality tables. Further, the district court fully considered the equitable considerations of financial impact as suggested by *Manhart* and *Norris* and found that the award could be paid without endangering or impairing the benefits owed to

<sup>14</sup>The employer's and Amici's professed concern for the benefits of "innocent third parties" does not warrant the denial of relief to these Plaintiffs. Proper deference to the financial impact upon a pension plan or taxpayers—as exhibited by the district court below—is full assurance that other innocent third parties in other future cases will not suffer harm.

<sup>15</sup>The employer goes out of its way to characterize the Plaintiff class' entitlement to retroactive relief as one of subject matter jurisdiction under Article III of the United States Constitution. The employer's apparent purpose is to deny fees and costs to the Plaintiff class for declaratory relief obtained even if the monetary relief is overturned. However, such a determination would not defeat subject matter jurisdiction. *Green v. Mansour*, 474 U.S. 64, 106 S.Ct. 423 (1985) does not compel a different result. In that case the issue was the basic authority of the district court to award relief under any circumstances due to 11th Amendment constraints. *Id.* at 425-26. Here relief is available; the question is whether there are such compelling equitable factors present to overcome the presumption of retroactive relief. Thus subject matter jurisdiction exists, regardless of the outcome. *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of America v. Brock*, 477 U.S. 274, 106 S.Ct. 2523, 2530 (1986).



retirees or otherwise harming any innocent third party. In sum, under "the particular circumstances of [this] case," *Franks, supra*, it simply cannot be said that the district court below abused its discretion in awarding monetary relief retroactive to the *Manhart* decision.

## II. PRORATION CONCEPTS ARE WHOLLY INAPPLICABLE, FACTUALLY AND LEGALLY, TO REDUCE THE RELIEF TO THE PLAINTIFF CLASS IN THIS CASE

The employer argues that under *Manhart* and *Norris* it was improper to award any relief to those class members who retired prior to the effective date of *Manhart*. The employer supports this conclusion with a convoluted and irrelevant theory of proration of damages based upon either benefits earned or contributions collected before and after the date of the *Manhart* decision. (Petitioners' Brief, Part II-A). The employer further argues that the trial court erred in refusing to reduce the relief to be paid to the post-*Manhart* portion of Plaintiff class to the extent that relief is "attributable" to benefits derived from pre-*Manhart* contributions. (Petitioners' Brief, Part II-B). This is essentially the same proration argument. The effect of the proration theory would be to reduce the relief awarded from \$43.6 million to as little as \$2.3 million. (A. 51).

The employer mischaracterizes this as a "legal" issue to avoid the burden of demonstrating that the district court's findings are clearly erroneous. However, their arguments belie this characterization because premised on factual issues which the district court did not accept. Moreover, to obtain a reversal here, the employer must further demonstrate that the district court's rejection of proration constituted an abuse of its broad, equitable discretion. Under either standard it is clear that these proration concepts have no application to this litigation.

First, the uncontroverted evidence as to the operational "mechanics" of this particular plan very clearly establishes

why the district court, in its discretion, rejected proration. The FRS is a defined benefit plan and not a defined contribution plan. Simply stated, benefits paid under the FRS plan are not "attributable" to any contributions made because accrued contributions have nothing to do with calculating benefits at time of retirement. (A. 66).

It is this fact which makes any proration concept inapplicable here. Proration generally assumes that vested pension benefits paid monthly to a retiree are fixed by the amount of contributions paid into the fund on his specific behalf plus investment earnings thereon as of the date of that employee's retirement. (A. 66). In Florida the idea of proration has no merit or logic because there is no direct causal relationship between contributions and the vested benefits owed. Unlike a defined contribution plan, contributions are not made on behalf of or for the account of any specific individual. There is no specific, discrete amount on hand at the time of retirement which funds that individual's benefits. Because the FRS is funded as a whole, adjusted as necessary over the years as circumstances may require, this equitable concern for the precise relationship between contributions and benefits simply does not exist.

Moreover, because the FRS is funded as a whole and without regard for any particular individual, current and future contributions to the FRS, in part, necessarily fund benefits now being paid and to be paid in the future to currently retired employees. It is therefore incorrect to say that contributions to fund pre-*Manhart* retirees necessarily terminated prior to the *Manhart* decision.

In fact, when *this* plan converted to unisex factors on August 1, 1983 for existing non-retired employees,<sup>16</sup> it did not do any kind of proration, whether benefit, contribution

<sup>16</sup>As noted, these are the Subclass B members.

or otherwise. It is wholly inconsistent for the employer to argue that it is equitably necessary to reduce the Plaintiff class' recovery by prorating when it obviously did not find it equitably necessary to do so when, based on exactly the same facts, it converted to unisex factors for the benefit of other employees. Further, the employer's own expert never testified proration *should* be done, only that it *could* be done. Thus, in light of the evidence received, the employer cannot establish that the district court was "clearly erroneous" or that it abused its discretion in finding proration concepts inapplicable to this plan.

In addition to being inapplicable to this plan, proration is also factually inapposite to this case. The proration concept arises only from an equitable concern that contributions collected to support a certain anticipated benefit level are insufficient to support an unexpectedly higher level of benefits. *Norris*, 463 U.S. at 1108 and n. 12, 103 S.Ct. at 3511 and n. 12, (Powell, J., concurring in part and dissenting in part); 463 U.S. 1110-11, 103 S.Ct. 3513 (O'Connor, J., concurring). This is the only reason discussed for limiting relief to benefits attributable to pre- or post-*Manhart* (or *Norris*) contributions. The concept thus presupposes insufficient cash reserves to support the additional obligations and is essentially a question of financial impact. This impact will always exist where such additional obligations are imposed on a defined contribution plan but may or may not exist where a defined benefit plan is involved. As noted, the FRS has ample cash reserves to satisfy this judgment over and above contributions necessary to fund benefits. The FRS also has the ability to revise the contribution rate. Thus, as the equitable concern of financial impact which gives rise to the proration concept does not exist in this case, proration has no application to this case. The outcome of the proration issue in other cases (i.e. *Retired Public Employees*, *supra*) is largely irrelevant to its proper outcome here as the foregoing facts do not appear to have been present in those cases. Proration concepts, therefore,

do not require the denial or reduction of relief to either pre- or post-*Manhart* retirees.

Having eliminated these equitable concerns for prorating relief, it is obvious that general principles of Title VII law require an award of relief to both pre- and post-*Manhart* retirees for disparate benefits retroactive to *Manhart*. See pages 28-29, *supra*. In *Bazemore v. Friday*, 478 U.S. \_\_\_, 106 S.Ct. 3000 (1986), this Court recognized that Title VII does not permit state employers to perpetuate discriminatory employment practices even if not previously actionable:

*A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date [March 24, 1972], and to the extent an employer continued to engage in that act or practice, he is liable under that statute. While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be imposed.*

*Each week's pay check that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII. The Court of Appeals plainly erred in holding that the pre-Act discriminatory difference in salaries did not have to be eliminated.*

*Id.* at 3006 (some emphasis added).<sup>17</sup> The parallels are obvious and compelling. This employer and its pension plan also had

<sup>17</sup>The employer's attempt to distinguish *Bazemore* as a "pure salary case" which did not discuss the "special considerations" applicable to pension plans nor refer to *Manhart* or *Norris* is untenable. (Petitioners' Brief at 44). In the first place, there are no "special considerations" applicable to Title VII suits involving pension plans which differentiate

[FOOTNOTE CONTINUED ON NEXT PAGE]



the duty to eliminate its pre-existing practices of discrimination, except that for purposes of this case the 1978 *Manhart* decision is the "effective date of Title VII" rather than March 24, 1972. Moreover, this duty did not extend only to persons retiring after that date but also to persons already retired. Just like each week's smaller pay check to blacks was illegal, "regardless of the fact this pattern was begun prior to the effective date of Title VII," each month's smaller retirement check to all class members violates Title VII, regardless of the fact that such payments were already being made prior to *Manhart*. Certainly, North Carolina could not continue to pay disparate salaries to black employees merely because they had been hired prior to the effective date of Title VII. To allow the FRS to continue to pay unequal benefits to pre-*Manhart* retirees does not eliminate discrimination, it perpetuates it.

Finally, the employer inaccurately asserts that all nine members of the *Norris* Court agreed that benefits attributable to pre-*Manhart* contributions are necessarily beyond adjustment. (Petitioners' Brief at 40). Writing for the damages dissent, Justice Marshall stated:

If, in the case of a particular female employee and a similarly situated male employee, petitioners could have applied sex-neutral tables to pre-*Manhart* contributions without violating any

(Footnote No. 17 continued)

them from "pure salary" claims. The non-retroactivity results reached in *Manhart* and *Norris* were simply based on application of established principles of equity which protect anyone from becoming legally liable retroactively for a sharp and unforeseeable departure from prior law. *E.g.*, *Chevron Oil Co. v. Hason*, 404 U.S. 97, 92 S.Ct. 349 (1971). When these factors do not exist, the general principles of Title VII are equally applicable to discrimination in pension benefits as they are to unequal salary or refusal to hire or promote. The fact that the *Bazemore* court did not find it necessary to cite *Manhart* or *Norris* does not lessen the application of its discussion of Title VII to this Title VII action.

contractual right of the male employee, they should have done so in order to prevent further discrimination in the payment of retirement benefits in the wake of this Court's ruling in *Manhart*. Since a female employee in this situation should have had sex-neutral tables applied to her pre-*Manhart* contributions, it is only fair that petitioners be required to supplement any benefits coming due after the District Court's judgment by whatever sum is necessary to compensate her for their failure to adopt sex-neutral tables.

463 U.S. at 1094, 103 S.Ct. 3504 (Marshall, J., dissenting) (emphasis added).

The remainder of this Court did not have to address this issue because as a threshold matter the damages majority found any retroactive relief inequitable under the circumstances of *Norris*. The district court below found that this employer had the authority to adopt unisex tables immediately following *Manhart* but failed to do so. (A. 42, ¶ 23). Thus, at least as to post-*Manhart* retirees, the damages minority would allow an award of retroactive relief for disparate benefits attributable to pre-*Manhart* contributions. Indeed, this language also supports Respondents' arguments above that the proration concept is discretionary not mandatory; such consideration only arises when the equities so require. Because, for the reasons stated above, neither the facts nor the equities support application of proration concepts herein, the district court plainly did not abuse its discretion in rejecting proration when fashioning relief.

### III. THERE IS NO BASIS TO DISTURB OR MODIFY THE TRIAL COURT'S RULINGS AS TO CLASS MEMBERSHIP OR THE BEGINNING DATE FOR THE TWO-YEAR BACK PAY PERIOD

#### A. The Discriminatory Event

Determination of when the effective discriminatory event occurred answers the employer's arguments concerning both



class membership and the timeliness of Plaintiffs Rassler's and Samaha's EEOC claims. The employer argues that a single discriminatory event occurs at the date of retirement and thus, the 300-day filing period runs from that point only. However, because each month's disparate retirement check is a separate actionable discriminatory event, the employer's conduct constitutes continuing discrimination. Thus, the EEOC filing can be made at any time. Moreover, for the same reason, the class properly includes anyone who received an unequal retirement check within the 300 days preceding the EEOC filing, regardless of when they retired. This was the specific act of discrimination alleged in the Complaint.

The concept of continuing discrimination was addressed by this Court in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885 (1977). In that case, the Court distinguished between the effect of a prior discriminatory act from current, ongoing acts which were neutrally applied to all employees, regardless of sex:

Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; *the critical question is whether any present violation exists*. She has not alleged that the system discriminates against former female employees or that it treats former employees who were discharged for a discriminatory reason any differently from former employees who resigned or were discharged for a non-discriminatory reason. *In short, the system is neutral in its operation.*

431 U.S. at 557-58, 97 S.Ct. at 1888-89 (some emphasis added). *Bazemore, supra*, in which this Court flatly stated "Each week's pay check that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII . . ." also demonstrates that each month's receipt of an unequal benefit check is a new, separate discretionary event.

This distinction has been uniformly recognized and applied by the several circuit courts of appeal, including cases involving pensions. *Stewart v. CPC Int'l, Inc.*, 679 F.2d 117, 120 (7th Cir. 1982); *Allen v. United States Steel Corp.*, 665 F.2d 689 (5th Cir. 1982); *Roberts v. North American Rockwell Corp.*, 650 F.2d 823, 827-28 (6th Cir. 1981); *Jenkins v. Home Ins. Co.*, 635 F.2d 310, 312 (4th Cir. 1980); *Guardians Ass'n of New York City Police Dep't v. Civil Service Comm'n of New York*, 633 F.2d 232, 250 n. 35 (2d Cir. 1980), *aff'd in part with opinion*, 463 U.S. 582, 103 S.Ct. 3221, *cert. denied in part*, 463 U.S. 1228, 103 S.Ct. 3568 (1983); *Dobbs v. City of Atlanta, Ga.*, 606 F.2d 557, 559 (5th Cir. 1979) (pension case). Moreover, the continuing discrimination principle was expressly endorsed by Congress when amending Title VII in 1972, as applied in then existing case law. Conference Report to the Equal Employment Opportunity Act of 1972, Pub.L.No. 92-261, 86 Stat. 103 (1972), *reprinted in*, 118 Cong.Rec. 7166, 7167.

Under the controlling case law of this Court, uniformly applied by the circuit courts, this case clearly presents "continuing discrimination". Although *Evans* found no continuing violations in that case, its rationale and analysis compels a determination that a continuing violation exists in this case. In *Evans* the discrimination was not in the administration of the pension plan itself but due to events which had occurred over two years previously during employment; at the time the EEOC charge was filed the pension plan was operated in a neutral manner. Here, however, the discrimination *is* in the operation of the pension plan. This plan *was* being operated illegally when the EEOC charges were filed. As noted, each month class members continue to be treated differently from female retirees solely because of their sex. There is no single, discrete past discriminatory event after which, while the effects continue, all persons similarly situated are treated the same. *Bazemore* clearly would not uphold the unequal weekly pay check simply because the employer maintained separate pay schedules for black and white employees applied at the time

of hire, thus making the time of hire the discriminatory event. Similarly, the fact that different mortality tables were applied by this employer at the time of retirement does not make the time of retirement the discriminatory event.

The employer's argument that the discriminatory event occurs when an employee is told what his monthly benefits are going to be and not when the discrimination actually occurs is nonsense and is not supported by the cases cited. (Petitioners' Brief at 45). In *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498 (1980), a black Liberian professor was denied tenure but permitted to remain for an additional year under a "terminal" contract. This Court held that the additional year of employment did not extend the time for filing a charge of discrimination for the refusal to grant tenure, which was the precise—and only—"unlawful employment practice" alleged in the complaint. As noted in *Chardon v. Fernandez*, 454 U.S. 6, 7, 102 S.Ct. 28, 29 (1981), also cited without discussion for this proposition and which also involved a professor's denial of tenure, "there were no other allegations, either in *Ricks* or in these cases, of illegal acts subsequent to the date on which the decisions to terminate were made." *Id.* The single act of denial of tenure is quite different from the receipt each month of unequal benefit checks. See *Schulte v. New York*, 533 F.Supp. 31, 34 (E.D.N.Y. 1981). Moreover, in this case, it is precisely the unequal payment of monthly retirement benefits which constitutes the discriminatory acts alleged in the Complaint. (J.A. 18, ¶ 17). *Ricks* does not, therefore, substantiate the argument that it is the time of retirement which constitutes the discriminatory event in this case.

As in *Bazemore* and the other cases above, this employer's actions constitute continuing discrimination because each month's unequal retirement check is "a wrong actionable under Title VII." 106 S.Ct. at 3006. The effect of this is two fold. First, it establishes the timeliness of Plaintiff Samaha's EEOC filing on December 27, 1979 and Plaintiff Rassler's

EEOC filing on May 15, 1980. Because the discrimination was continuing, EEOC charges could be timely filed at any time. Second, the continuing nature of the discrimination also validates the class membership with reference to either class member Samaha's December 27, 1979 EEOC charge or class representative Rassler's May 15, 1980 EEOC charge.<sup>18</sup> Thus, the class properly includes everyone who received a discriminatory retirement check after either March 12, 1979 (300 days prior to the Samaha filing) or July 19, 1979 (300 days prior to the Rassler filing) and, as to all such persons, retroactive damages would be available from October 1, 1978 forward.<sup>19</sup>

<sup>18</sup>The employer also makes an argument that this 300-day period runs not from the date of filing of the EEOC charge but, rather, from the later date of the initiation of a federal court suit thereon. (Petitioners' Brief at 47). This rather novel argument was never raised below; to the contrary, the employer stated in its Eleventh Circuit Brief that "there is solid authority that only those persons who suffered discriminatory event within the requisite time frame before the date of filing . . . of the EEOC charge of discrimination are properly includable in a Title VII class." Petitioners' "Initial Brief of Appellants/Cross-Appellees" at 56 (emphasis added). Having failed to make or preserve this argument below, the employer may not do so now before this Court in the first instance. *Lawn v. United States*, 355 U.S. 339, 362 n.16, 78 S.Ct. 311, 324 n.16, reh'g denied, 355 U.S. 967, 78 S.Ct. 529 (1958). Moreover, the argument does not comport with common sense and certainly finds no support in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 103 S.Ct. 2392 (1983) nor elsewhere. The only issue in that case was whether the filing of a purported class action tolled the 90-day period following receipt of the Right-To-Sue Letter for filing of a separate lawsuit by a putative class member after class certification was denied. 462 U.S. at 438-39. No fair reading of *Crown, Cork & Seal* even remotely supports Petitioners' arguments. Case law uniformly recognizes that the filing of the EEOC charge is the applicable date for determining class membership. E.g. *Hervey v. City of Little Rock*, 787 F.2d 1223, 1227 (8th Cir. 1986); *Avagliano v. Sumitomo Shoji America, Inc.*, 103 F.R.D. 562, 578 (S.D.N.Y. 1984).

<sup>19</sup>Utilizing either the Samaha or Rassler filing date, the two-year retroactive relief period allowed under 42 U.S.C. § 2000e-5(g) runs back well beyond the October 1, 1978 effective date of *Manhart*, as determined by the trial court.



The employer suggests, but does not actually argue, that it was error for the district court to utilize the December 27, 1979 filing of class member N. Louis Samaha in determining the appropriate limitations period for back pay and class membership because Mr. Samaha was not a named class representative. (Petitioners' Brief at 46, n. 32). The policy and purpose of the requirement of an EEOC charge as a prerequisite to a Title VII suit is simply to give the EEOC an opportunity to investigate the matter and attempt to obtain a reconciliation of the claim. *Jackson v. Seaboard Coast Line R.R.*, 678 F.2d 992, 1005 (11th Cir. 1982). Because these filing requirements are procedural rather than substantive they are not jurisdictional and are subject to equitable considerations such as waiver, estoppel or equitable tolling. *Id.* at 1006, citing, *Zipes v. Trans World Airlines Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 1132, *reh'g denied*, 456 U.S. 940, 102 S.Ct. 2001 (1982). The EEOC charge of a non-named class member fully satisfies these purposes, and therefore may be utilized to establish class membership and back pay parameters. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 472 (D.C.Cir. 1976) ([T]he purposes of the filing requirement—to give notice to the charged party and enable the Commission to conciliate—are adequately served by a timely filing by any member of the class.") (emphasis added), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1281 (1978); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969) ("It is apparent that each of these purposes is served when any charge is filed and a proper suit follows which fairly asserts grievances common to the class to be afforded relief in the court") (emphasis added); *Shannon v. Hess Oil Virgin Islands Corp.*, 100 F.R.D. 327, 330 (D.V.I. 1983) (Plaintiffs may participate in Title VII suit "as long as . . . at least one plaintiff or class member" has filed administrative charges) (emphasis added).

The employer also suggests, but does not seriously argue, that the original Samaha and Rassler EEOC charges are ineffective as to the FRS because they did not name the FRS

as the respondent and that the FRS only had "actual notice" of the amended charges which did name the FRS. The argument is specious. First, applicable EEOC regulations clearly state that amended EEOC charges "relate back" to the original filing date. 29 C.F.R. § 1601.12(b) (1979). Furthermore, "actual notice" is neither the standard nor the issue and is thus legally irrelevant. Because EEOC charges are often, as here, drafted by lay persons, they are liberally construed and the standard for determining proper parties are those persons who would be within the reasonable limits of an EEOC investigation pursuant to the charge. *E.g., Terrell v. U.S. Pipe & Foundry Co.*, 644 F.2d 1112, 1123 (5th Cir. 1981), *vacated and remanded on other grounds*, 456 U.S. 955, 102 S.Ct. 2028 (1982); *Romero v. Union Pacific R.R.*, 615 F.2d 1303 (10th Cir. 1980); *Shehadeh v. Chesapeake and Potomac Telephone Co. of Maryland*, 595 F.2d 711, 727-28 (D.C. Cir. 1978); *Kaplan v. Int'l Alliance of Theatrical and Stage Employees and Motion Picture Mach. Operators of the United States and Canada*, 525 F.2d 1354, 1358-59 (9th Cir. 1975). Here, the original Samaha and Rassler EEOC charges named their immediate past employers as respondents and specifically stated in the body of the charge that the FRS paid disparate benefits to males and females. The charges were later amended to name the FRS, which amendments relate back to the original filing. These facts conclusively establish that the operative dates of the EEOC charges are of those the original filings and are proper predicates for this suit against these defendants.

#### B. Waiver

The parties stipulated to the certification of this cause as a class action pursuant to the Plaintiffs' definition of the class as set forth in their Complaint on September 27, 1982. (R. 4-55-1 to 2, 4 to 5, 7). There was no contention that the class should be limited to persons *retiring*—as opposed to receiving discriminatory benefits—within 300 days preceding Mr. Long's EEOC charge. This issue was not affected by the later addition of Mr. Rassler as a class representative or the



reliance upon Mr. Samaha's EEOC filing. If it was viable at all, it was equally viable at the time of this stipulation.

Similarly, when these issues were resolved by the district court, there was no issue raised as to whether Mr. Rassler's original charges were timely or whether Mr. Samaha's charges could be considered at all. The only issue taken by the employer was whether they had notice of Mr. Samaha and Mr. Rassler's original charges or whether their August, 1981 amended charges were the first operative notice. (R. 8-2773-5 to 6). If the employer had these other arguments to make, and if they had not already been waived by virtue of the class stipulation, that was the time to do so.

For both of these reasons, these objections had been waived and were no longer viable at the time of the February 1986 impact hearing. The employer relies upon the fact that these issues were included in the parties' Pre-trial Stipulation. However, Plaintiffs' class specifically objected to these matters being included in the Pre-trial Stipulation or raised at the impact hearing. (A. 97). Plaintiffs' class also timely objected at trial when the employer attempted to introduce evidence on these issues. (R. 19-2924-24 to 25, 27, 29).

As noted previously, such matters are procedural, not substantive, and are not jurisdictional prerequisites to a Title VII action. As such, they are subject to equitable considerations of waiver and estoppel. *Zipes, supra*; *Jackson, supra*. As of the trial date, the parties had long since addressed and resolved these matters and thereafter proceeded for years based on these criteria for class membership. Under these circumstances, equitable considerations compel the conclusion that the employer has waived any right to raise the arguments that Mr. Samaha's and Mr. Rassler's EEOC charges were untimely, whether Mr. Samaha's charge could be considered at all or whether the class should only include persons who retired within 300 days of Mr. Long's (or Messrs. Samaha's and Rassler's) EEOC charge.

## CONCLUSION

Accordingly, for all the foregoing reasons, the judgment of the Eleventh Circuit Court of Appeals below should be affirmed.

Respectfully submitted,

WOODROW M. MELVIN, JR.,  
ESQUIRE

*Counsel of Record*

KEITH OLIN, ESQUIRE  
RUDEN, BARNETT, McCLOSKEY,  
SMITH, SCHUSTER &  
RUSSELL, P.A.

One Biscayne Tower  
Suite 2020

2 South Biscayne Boulevard  
Miami, Florida 33131  
Tel: (305) 371-6262

and

JEROLD FEUER, ESQUIRE  
402 N.E. 36th Street  
Miami, Florida 33137-3913

and

DAVID POPPER, ESQUIRE  
Dadeland Square Bldg.  
7700 N. Kendall Drive  
Suite 710  
Miami, Florida 33156

ATTORNEYS FOR RESPONDENTS

No. 86-1685

In The  
**Supreme Court of the United States**  
October Term, 1987

STATE OF FLORIDA, *et al.*,  
*Petitioners,*  
v.

HUGHLAN LONG, S. Dewey Haas, and Carl Rassler,  
individually and on behalf of all retired and present  
male employees subject to the Florida Retirement Sys-  
tem established by Chapter 121, Florida Statutes, as  
well as the surviving joint annuitants of any deceased  
retired male employees,

*Respondents.*

**ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**REPLY BRIEF FOR PETITIONERS**

CHARLES T. COLLETTE  
Counsel of Record  
DOUGLAS A. MANG  
BRUCE A. MINNICK  
Mang, Rett & Collette, P.A.  
Post Office Box 11127  
Tallahassee, FL 32302-3127  
(904) 222-7710

AUGUSTUS D. AIKENS, JR.  
General Counsel  
Florida Department of  
Administration  
435 Carlton Building  
Tallahassee, FL 32309-1550  
(904) 488-4747

*Attorneys for Petitioners*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE CASE .....	1
I. Reply to Plaintiffs' General Factual Assertions..	1
II. Reply to Plaintiffs' Assertions That the FRS Has the Financial Ability to Sustain the Relief Awarded .....	5
III. Reply to Plaintiffs' Proration Assertions .....	7
IV. Reply to Plaintiffs' Assertions As to the Title VII Administrative Exhaustion & Proper Scope of the Class Issues .....	8
ARGUMENT	
I. <i>NORRIS</i> AND ALL REPORTED CIRCUIT COURT DECISIONS CONSTRUING AND AP- PLYING <i>NORRIS</i> (EXCEPT THE 11TH CIR- CUIT'S DECISION IN THIS CASE) REQUIRE A FINDING AS A MATTER OF LAW THAT THE AWARD OF RELIEF TO PLAINTIFFS AND THE PLAINTIFF CLASS HEREIN (WHO ARE ALL PRE-AUGUST 1, 1983 (RE- TIRES)) IS BARRED.....	9
II. ALTERNATIVELY, SHOULD THE DATE OF <i>MANHART</i> RATHER THAN DATE OF <i>NOR-</i> <i>RIS</i> BE DEEMED CONTROLLING IN THIS CASE, AS A MATTER OF LAW PRORATION MUST BE APPLIED TO THE AWARD OF RELIEF HEREIN. ....	12



## TABLE OF CONTENTS—Continued

Page

III. ALTERNATIVELY, SHOULD THE DATE OF MANHART RATHER THAN THE DATE OF NORRIS BE DEEMED CONTROLLING IN THIS CASE, NEVERTHELESS 42 U.S.C. § 2000e-5(g)'s TWO-YEAR LIABILITY CUT-OFF DATE MUST BE FIXED HEREIN AT OCTOBER 7, 1979—TWO YEARS BEFORE PLAINTIFF LONG'S OCTOBER 7, 1981 EEOC CHARGE OF DISCRIMINATION—AND THE PLAINTIFF CLASS LIMITED TO THOSE PERSONS WHO RETIRED NO MORE THAN 300 DAYS PRIOR TO THE JULY 2, 1982 FILING OF THE INITIAL CLASS ACTION COMPLAINT IN THIS CAUSE (OR, AT BEST, TO THOSE PERSONS WHO RETIRED NO MORE THAN 300 DAYS PRIOR TO PLAINTIFF LONG'S OCTOBER 7, 1981 EEOC CHARGE).	14
--	----

## TABLE OF AUTHORITIES

Page

## CASES

<i>Arizona Governing Committee for Tax Deferred Annuity &amp; Deferred Compensation Plans v. Norris</i> , 463 U.S. 1073 (1983) ("Norris")	passim
<i>City of Los Angeles, Dep't of Water &amp; Power v. Manhart</i> , 435 U.S. 702 (1978) ("Manhart")	passim
<i>Crown, Cork &amp; Seal Co. v. Parker</i> , 462 U.S. 345 (1983)	17, 18
<i>Graham v. State of New York Dep't of Civil Service</i> , 653 F.Supp. 1363 (S.D. N.Y. 1987), appeal pending	11
<i>Hannahs v. N.Y. State Teachers' Retirement System</i> , 656 F.Supp. 387 (S.D. N.Y. 1987), <i>aff'd sub nom, Brown v. N.Y. State Teachers' Retirement System</i> , 834 F.2d 299 (2d Cir. 1987) (per curiam), earlier decision, 26 F.E.P. Cases 527 (S.D. N.Y. 1981)	9, 10, 15
<i>Jackson v. Seaboard Coast Line R. Co.</i> , 678 F.2d 992 (11th Cir. 1982)	16
<i>Long v. State of Florida</i> , 805 F.2d 1542 (11th Cir. 1986), cert. granted	passim
<i>Probe v. State Teachers' Retirement System</i> , 780 F.2d 776 (9th Cir.), cert. denied, — U.S. —, 90 L.Ed.2d 978 (1986) ("Probe")	12
<i>Retired Public Employees' Ass'n of California v. State of California</i> , 799 F.2d 511 (9th Cir. 1986), rev'g, 614 F.Supp. 571 (N.D. Cal. 1984) ("Retired Public Employees")	11, 15
<i>Spirt v. Teachers' Ins. &amp; Annuity Ass'n</i> , 735 F.2d 23 (2d Cir.), cert. denied, 469 U.S. 881 (1984) ("Spirt II")	10, 11, 15
<i>Terrell v. U.S. Pipe &amp; Foundary Co.</i> , 644 F.2d 1112 (5th Cir. 1981), vacated & remanded, 456 U.S. 955 (1982)	16

## TABLE OF AUTHORITIES—Continued

## Page

<i>Zipes v. Trans World Airlines, Inc.</i> , 455 U.S. 385 (1982) _____	16
---	----

## STATUTES

Title VII, Civil Rights Act of 1964 _____	1, 4, 8, 9, 14, 15, 16
42 U.S.C. § 2000e-5(e) _____	17
42 U.S.C. § 2000e-5(g) _____	14, 15

## OTHER AUTHORITIES

Hager & Zimpleman, <i>The Norris Decision, Its Implications &amp; Applications</i> , 32 Drake L. Rev. 913 (1983) _____	7, 8
---	------

## STATEMENT OF THE CASE

## I. Reply to Plaintiffs' General Factual Assertions

Plaintiffs, just as they did in the 11th Circuit, here again endeavor to present this case as factually unique. It is not, and the 11th Circuit did not find it so, *see* 805 F.2d at 1547 n.6 (J.A. 260 n.6):

Plaintiff class argues that the district court's finding that the FRS was on notice that it had to base its optional pension plans on sex-neutral mortality tables as of 1978 was a finding of fact subject to the clearly erroneous standard of review. Although the district court considered evidence regarding whether the system administrators actually knew that their optional pension plans violated Title VII, the district court's decision ultimately turned on whether the language of the *Manhart* decision put a reasonable employer on notice that it must convert to sex-neutral mortality tables. Therefore, the district court's finding that the FRS was on notice as of the Supreme Court's 1978 decision in *Manhart* is a question of law subject to review under the error of law standard.

Indeed, not only did plaintiffs submit the district court's subsidiary findings<sup>1</sup> and their specific memorandum factual argument to the 11th Circuit in support of their argument that the standard of review was "clearly er-

---

<sup>1</sup>Plaintiffs, in their "Brief for Respondents" at pp. 4-5, fail to detail what was perhaps the district court's central subsidiary finding—such being that, while "defendants' wait-and-see policy was a product of poor judgment," "[n]one of the principals involved in the decision-making harbored any evil intent or design" (Pet.App. A64). For this Court's reference, the "principals" referred to by the district court are Director McMullian, who is a petitioner in this Court, and Secretary Smith, whose successor Adis Vila is also a petitioner in this Court (*see* initial "Brief for Petitioners" at pp. iii, iii n.2, xii & xii n.5).

roneous" rather than "error of law," they likewise submitted precisely the same two things in support of their argument that the State acted in "bad faith" in not promptly converting to unisex tables following the *Manhart* decision. Plaintiffs' "bad faith" argument was, of course, also rejected by the 11th Circuit, *see* 805 F.2d at 1150 & 1552 (J.A. 267-268 & 271), and has now likewise been rejected by this Court (*see* Sup.Ct. Case No. 86-1852, review denied October 5, 1987).

In short, the subsidiary findings of the district court were not discussed in the initial "Brief for Petitioners" because they are irrelevant to the central question of law which must be decided in this case—and that is whether this Court's *Norris* decision bars the award of relief herein. This question was presented to the 11th Circuit as one of law, and the question has been presented to this Court as one of law. Moreover, in their argument in their initial 11th Circuit brief on this question, defendants in fact discussed these district court subsidiary findings and specifically pointed out they were irrelevant to the central question of law in this case (*see* 11th Circuit "Initial Brief of Appellants/Cross-Appellees" (dated 7/28/86) at p.37 & p.37 n.10). As noted above the 11th Circuit agreed, *again see* 805 F.2d at 1547 n.6 (J.A. 260 n.6), and no further discussion of these subsidiary findings was had by the 11th Circuit, except in the context of plaintiffs' "bad faith" argument, *again see* 805 F.2d at 1550 & 1552 (J.A. 267-268 & 271).

As for plaintiffs' specific memorandum factual legal argument, i.e., that the State was on actual notice it should have converted to unisex tables promptly following *Man-*

*hart*, such of course is likewise irrelevant to the central question of law which must be decided in this case. Indeed, such was only relevant to plaintiffs' "bad faith" argument which, as noted above, has been rejected by both this Court and the 11th Circuit. Further, and in point of fact, the complete picture of what occurred is substantially different from what plaintiffs argue and that complete picture has already been provided this Court by the "Statement of the Case" in the State's "Brief in Opposition to Cross-Petition for Certiorari," at pp.3-9 (Sup.Ct. No. 86-1852, brief filed June 1987).

In the interest of brevity, the Court's attention is here only directed to that previous "Statement of the Case" should it wish to be fully apprised as to the complete picture.<sup>2</sup> Suffice it here only to note in brief summary that neither of the two principals (Secretary Smith and Director McMullian), nor Mr. Gibney nor Mr. Kerns nor Mr. Aikens, held the opinion that *Manhart* required the State to convert to unisex mortality tables for the calculation of the FRS' three forms of optional joint-annuitant benefits—let alone that *Manhart* provided any direction on how the State might legally and properly do so.

The bottom line is that the administrators of the FRS, like all conscientious pension plan administrators throughout the United States following *Manhart*, were endeavoring to stay fully apprised of *Manhart*, its developments, and the consequences of such on their pension plans. Indeed,

---

<sup>2</sup>That previous "Statement of the Case" is fully cross-referenced and documented to the record on appeal in this Court. *Again see* State's "Brief in Opposition to Cross-Petition for Certiorari," at pp. 3-9 (Sup.Ct. #86-1852, filed June 1987).



the 1984 Legislature adopted an increase in contribution rates 24 basis points above that recommended by the State's consulting actuaries in their 1981-1983 actuarial review, because the consulting actuaries' subsequent biennial review nevertheless established such was not sufficient to keep the FRS in actuarial balance—i.e., that the FRS was not collecting sufficient contributions to cover promised benefits (see "Brief for Petitioners" at p.14 n.17—citing "Affidavit of Andrew J. McMullian, III," attached to "Appellants' Notice of Filing Affidavits" filed in the 11th Circuit on June 27, 1986, in support of the State's emergency motion for stay pending appeal). Additionally, such glosses over the fact that "there is no dispute that the award in this case would be paid by the FRS (the plan) or its 1,100 plus participating Florida governmental employers through increased contribution rates" (see "Brief for Petitioners" at p.15).

Finally, and frankly recognizing that such is completely tangential to the central question of law to be decided in this case, the issue that the 24 basis points generated only about \$33.6 to \$38.4 million for the two years it was in effect (see "Brief for Petitioners" at pp.13-14)—not \$216 million—should nevertheless and finally be laid to rest. The record unequivocally establishes that the \$9.0 million value of one basis point, seized upon by plaintiffs to here again argue that the 24 basis point increase produced a \$216 million surplus for the FRS (see "Brief for Respondents" at pp.9, 9 n.4, 27 n.11, & 29-30; see also Pet.App. at A56, ¶ 5(c)), was an approximate fifteen (15) year amortization figure, which included interest and investment income and which was worked out backwards by defendants' actuarial expert during his cross-examination

by plaintiffs during the trial in this case; the \$9 million figure had nothing whatsoever to with the approximate \$33.6 to \$38.4 million the 24 basis points actually generated for the two years it was in effect (see R19-181 to 183 (partially reproduced at J.A. 109), *in conjunction with* R20-41 to 42 (reproduced at J.A. 131)).

### III. Reply to Plaintiffs' Proration Assertions

The only semi-important thing this Court need note with respect to plaintiffs' argument on this point is that the State presented the proration issue to the 11th Circuit as a question of law, i.e., "whether the district court erred, as a matter of law, in determining that proration should not be used in calculating the amount of relief to be awarded in this case" (see defendants' 11th Circuit "Initial Brief of Appellants/Cross-Appellees" (dated 7/28/86) at pp.1 & 26; see also defendants' 11th Circuit "Reply Brief of Appellants/Cross-Appellees" (dated 8/27/86) at pp.29-30). The question as presented to this Court is also one of law (see "Brief for Petitioners" at pp.41-43). The only factual issue relating to this is whether "contribution proration" or "accrued benefit proration" is more applicable to a defined benefit plan such as the FRS, with the State not really herein arguing anything other than that "accrued benefit proration" is more directly applicable. (see "Brief for Petitioners" at p.42)—especially since commentators with eminent credentials in the pension area have recognized the applicability of "accrued benefit proration" to defined benefit plans such as the FRS, see Hager & Zimpleman, *The Norris Decision, Its Implications & Applications*, 32 Drake L. Rev. 913, 915 n.8, 936-

37, & 938-39 (1983); *see also* "Brief for Petitioners" at p.42.

#### IV. Reply to Plaintiffs' Assertions As to the Title VII Administrative Exhaustion & Proper Scope of the Class Issues

Plaintiffs' presentation in this regard (*see* "Brief for Respondents" at pp.13-14) directly ties in to their subsequent argument that the State has waived consideration of the Title VII exhaustion and class scope issues in this appeal (*Id.* at pp.43-44). In short, consideration of these issues was and has not been waived—not in the district court, not in the 11th Circuit, and not in this Court. There is absolutely no question as to this (*see* "Brief for Petitioners" at pp.7-8), and in this regard the Court may wish to closely examine the portions of the district record exhaustively cited at page 7 in the State's initial "Brief for Petitioners." The fact that very early on in this case the parties stipulated it could be maintained as a class action (*see* R4-56-1 & 2) has absolutely no bearing on the exhaustion and scope of class issues.

Moreover, when the State presented these issues to the 11th Circuit, plaintiffs also there made the same arguments they here make as to defendants' waiver of consideration of these issues (*see* plaintiffs' 11th Circuit "Answer Brief of Appellants Hughlan Long, et al." (dated 8/22/86) at pp.52-54). Defendants extensively replied to plaintiffs' 11th Circuit waiver argument (*see* the State's 11th Circuit "Reply Brief of Appellants/Cross-Appellees" (dated 8/27/86) at pp.24-26), and that 11th Circuit reply

argument will not be here repeated.<sup>4</sup> Suffice it here only to further note that the 11th Circuit addressed and resolved the Title VII exhaustion and class scope issues on the merits, albeit adverse to the State's position, *see* 805 F.2d at 1546 (J.A. 258-259). By doing so it clearly rejected the plaintiffs' waiver argument for, had it found that argument meritorious, it would never have reached and would not have addressed the merits of the Title VII exhaustion and class scope issues.

### ARGUMENT

#### I. NORRIS AND ALL REPORTED CIRCUIT COURT DECISIONS CONSTRUING AND APPLYING NORRIS (EXCEPT THE 11TH CIRCUIT'S DECISION IN THIS CASE) REQUIRE A FINDING AS A MATTER OF LAW THAT THE AWARD OF RELIEF TO PLAINTIFFS AND THE PLAINTIFF CLASS HEREIN (WHO ARE ALL PRE-AUGUST 1, 1983 RETIREES) IS BARRED.

In its initial "Brief for Petitioners" the State cited the Court to an as of then unreported district court decision which supported the State's position on this central question that *Norris* barred the award of relief in this case, and noted the case was pending at that time on appeal to the 2d Circuit. As then cited the case was *Hannahs v. N.Y. State Teachers' Retirement System*, No.

<sup>4</sup>The citation to defendants' 11th Circuit reply argument on the waiver issue is provided so that this Court may review it in detail should it so desire. However, the lack of any colorable merit to plaintiffs' argument in this regard simply does not justify herein repeating that 11th Circuit reply argument.

78 Civ. 2541-CSH (S.D. N.Y., filed March 9, 1987). This is to advise the Court that the 2d Circuit has affirmed the district court and that the decisions of both courts are now reported. See *Hannahs v. N.Y. State Teachers' Retirement System*, 656 F.Supp. 387 (S.D. N.Y. 1987), *aff'd sub nom, Brown v. N.Y. State Teachers' Retirement System*, 834 F.2d 299 (2d Cir. 1987) (per curiam).

*Hannahs*, as here, dealt with the question of whether *Norris* barred relief sought by retirees in a Title VII sex-discrimination pension benefit case against a state operated and administered pension plan. Also in *Hannahs*, as here, the state changed the benefit structure of its plan to uni-sex following *Norris* in order to bring its plan into compliance with its reading of that decision, see 656 F.Supp. at 391. It did not change its plan after *Manhart*, even though the *Hannahs* case had been pending in the district court since 1978 and there was no question that that plan's administrators were fully aware of *Manhart* and the issues raised thereby, cf. 26 F.E.P. Cases 527 (S.D. N.Y. 1981) (an earlier decision in the *Hannahs* case).

Nevertheless, Judge Haight of the district court, construing and applying the 2d Circuit's vested-contract-right holding in *Spirt II*,<sup>5</sup> see 656 F.Supp. at 390-91, held *Norris* barred all of the relief requested by the *Hannahs*' plaintiffs, both retrospective and prospective, and so granted final summary judgment to the state. In so doing, he noted that "[t]he effective date of the *Norris* judgment

<sup>5</sup>*Spirt v. Teachers' Ins. & Annuity Ass'n*, 735 F.2d 23, 28-29 (2d Cir.), cert. denied, 469 U.S. 881 (1984) ("*Spirt II*"). *Spirt II*'s vested-contract-right holding has already been analyzed in detail in the initial "Brief for Petitioners" at pp. 35-36.

is August 1, 1983," and that this date "becomes the watershed for structuring relief," 656 F.Supp. at 389. In this immediate context he also noted that "*Manhart* and *Norris* voice broad concerns, rooted in policy, and clearly intended by the [Supreme] Court to apply to all comparable plans," *Ibid*.

As above noted, the 2d Circuit has now affirmed Judge Haight's decision in a per curiam opinion, see 834 F.2d at 300: "We affirm, for the reasons stated by Judge Haight." Thus there can now be absolutely no question that were the FRS in the 2d Circuit where *Spirt II* and now *Hannahs* control, there would have been a zero liability finding herein rather than \$43.6 million awarded and affirmed below.<sup>6</sup>

To change, and though of little relevance to the central question to be decided in this case, two additional matters raised by plaintiffs in their "Brief for Respondents" merit at least a brief reply. First, at page 25 n.9 thereof they seem to suggest that the 9th Circuit's decision in *Retired Public Employees*<sup>7</sup> resolved none of the issues in this case. An examination of the *Retired Public Employees* district court opinion, see 614 F.Supp. 571 at 575 & 578 (N.D. Cal. 1984), subsequently reversed by the 9th Circuit, will quickly dispel any possible misconceptions in this regard. There-

<sup>6</sup>In other words, plaintiffs' reliance on *Graham v. State of New York Dep't of Civil Service*, 653 F.Supp. 1363 (S.D. N.Y. 1987), appeal pending, is completely misplaced. See "Brief for Respondents" at p.28 n.13.

<sup>7</sup>*Retired Public Employees' Ass'n of California v. State of California*, 799 F.2d 511 (9th Cir. 1986), rev'g, 614 F.Supp. 571 (N.D. Calif. 1984).



at the district court advanced the very same reasons for its award of relief, based on the difference between the defined benefit plan therein at issue and defined contribution plans, as the 11th Circuit advanced in affirming the award of relief in this case and as plaintiffs now urge in this Court. Even though the 9th Circuit did not specifically discuss this district court rationale in its subsequent reversal, *see* 799 F.2d 511 (9th Cir. 1986), that complete reversal itself means the 9th Circuit considered the distinctions between defined benefit and defined contribution plans of no moment to reaching its decision.

Second, at page 25 n.10 of their "Brief for Respondents" plaintiffs argue that the issues of the *Manhart* "open market exception" and of *Norris* only applying to third-party insurers were not before the 9th Circuit in *Probe*.<sup>9</sup> Such may or may not have been the case, but the issues were squarely raised by the *Probe* plaintiffs in their unsuccessful petition for certiorari to this Court. *See* "Petition for Writ of Certiorari" in Sup.Ct. Case No. 85-1665, at pp.9-11.

**II. ALTERNATIVELY, SHOULD THE DATE OF MANHART RATHER THAN DATE OF NORRIS BE DEEMED CONTROLLING IN THIS CASE, AS A MATTER OF LAW PRORATION MUST BE APPLIED TO THE AWARD OF RELIEF HEREIN.**

The State's reply to plaintiffs' arguments hereunder has already been made in Parts II & III of the "Statement of the Case" in this Reply Brief, *supra* at pp.5-8. Suf-

<sup>9</sup>*Probe v. State Teachers' Retirement System*, 780 F.2d 776 (9th Cir.), cert. denied, — U.S. —, 90 LEd.2d 978 (1986).

fice it here only to additionally note that the "FRS is more than 100% funded" to cover all earned benefits, which means it has enough assets to cover the benefits of all its retirees and those benefits promised to its active members who have not yet retired but who (by virtue of length service) have obtained a vested right to receive benefits upon date of retirement<sup>9</sup> (*see, e.g.,* J.A. 204-205—P.Ex. 18, R20-46 & 47, *in conjunction with* D.Ex. 35-1 & 2, R20-45 & 47, and particularly D.Ex. 35-2 at ¶ (1)). What the FRS does not yet have is sufficient assets to cover future lives (i.e., those persons who have not yet come into the system) and benefits promised to those of its active unretired members who have not yet obtained a vested right to receive benefits upon date of retirement (*again see, e.g.,* J.A. 204-205—P.Ex. 18, *in conjunction with* D.Ex. 35-2), and this directly ties into the present unfunded liability of the FRS (*see* J.A. 204-205—P.Ex. 18; *see also* initial "Brief for Petitioners" at p.11 n.14).

Defendants would here further only briefly reiterate that there is no question "accrued benefit proration" fully applies to defined benefit pension plans such as the FRS, and its use does not require approximation (*see* Part III of the "Statement of the Case" in this Reply Brief, *supra* at pp.7-8; *see also* initial "Brief for Petitioners" at p.42).

<sup>9</sup>*See* Pet.App. at A108, ¶ 39, for the times when the right to receive benefits vests.

**III. ALTERNATIVELY, SHOULD THE DATE OF MANHART RATHER THAN THE DATE OF NORRIS BE DEEMED CONTROLLING IN THIS CASE, NEVERTHELESS 42 U.S.C. § 2000e-5(g)'s TWO-YEAR LIABILITY CUT-OFF DATE MUST BE FIXED HEREIN AT OCTOBER 7, 1979—TWO YEARS BEFORE PLAINTIFF LONG'S OCTOBER 7, 1981 EEOC CHARGE OF DISCRIMINATION—AND THE PLAINTIFF CLASS LIMITED TO THOSE PERSONS WHO RETIRED NO MORE THAN 300 DAYS PRIOR TO THE JULY 2, 1982 FILING OF THE INITIAL CLASS ACTION COMPLAINT IN THIS CAUSE (OR, AT BEST, TO THOSE PERSONS WHO RETIRED NO MORE THAN 300 DAYS PRIOR TO PLAINTIFF LONG'S OCTOBER 7, 1981 EEOC CHARGE).**

The second part of plaintiffs' submission on this point argues that the State has waived consideration by this Court of the Title VII exhaustion and class scope limitation issues. As plaintiffs' argument in this regard has been previously replied to in this brief (see Part IV of the "Statement of the Case" in this Reply Brief, *supra* at pp.8-9), no further reply thereon will be herein made. Turning, then, to plaintiffs' argument on the merits.

First, as to whether the "continuing violation theory" applies in Title VII sex-discrimination pension benefit cases such as this, the issue has been fully joined. There is nothing to add to the previous briefing *except* to underscore the importance of this issue. Notwithstanding that "*Norris*, by its denial of retroactive relief in the form of prospective adjustment of pension benefits, negates application of the continuing violation theory in the pension context" (see "Brief for Petitioners" at p.44), were the theory nevertheless held to apply in cases such as this, such would mean that any living retiree under any pension

plan in the United States, even if he or she retired in the 1950's or 1960's, has a potential Title VII action presently available for at least prospective adjustment of his or her pension benefits if sex-distinct mortality tables were used in calculation thereof (see "Brief for Petitioners" at p.25) —and they were.<sup>10</sup> If the continuing violation theory were to be applied in this case, then such would mean that it would apply to all Title VII sex-discrimination pension benefit cases and this would completely vitiate "the broad concerns rooted in policy" expressed in *Manhart* and *Norris*, see *Hannahs v. N.Y. State Teachers' Retirement System*, *supra* 656 F.Supp. at 389, *aff'd*, 834 F.2d 299 (2d Cir. 1987). Those "broad policy concerns," of course, resulted in this Court denying retroactive relief in both *Manhart* and *Norris*. Holding the theory applicable in pension benefit cases such as this would also mean that the 9th Circuit was wrong in *Probe* and *Retired Public Employees*, and the 2d Circuit wrong in *Spirt II* and *Hannahs*, and would in effect overrule those decisions.

Second, if the continuing violation theory does not apply, then plaintiff Rassler's and class member Samaha's initial charges of discrimination are untimely, and only plaintiff Long's October 7, 1981 EEOC charge can be looked to to establish 42 U.S.C. § 2000e-5(g)'s two-year liability cut-off date as well as, possibly, the scope of the class in this case (see "Brief for Petitioners" at pp.17-18 & 46). If the theory does apply, then in any event the two-year liability cut-off date in this case must be fixed at no

<sup>10</sup>The Court can take judicial notice of the fact that, prior to its April 1978 decision in *Manhart*, virtually all pension plans throughout the United States used sex-distinct mortality tables in the calculation of their retirement benefits.



earlier than August 24, 1979, which is two years before plaintiff Rassler's amended August 24, 1981 charge of discrimination.

In this latter regard plaintiffs argue that either plaintiff Rassler's initial May 15, 1980 charge or class member Samaha's initial December 27, 1979 charge can be used to fix the two-year liability cut-off date herein. However, plaintiffs bypass the fact that under 11th Circuit authority construing and applying this Court's decision in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), they had the burden of proof on the Title VII exhaustion issues herein. See *Jackson v. Seaboard Coast Line R. Co.*, 678 F.2d 992, 1010 (11th Cir. 1982). They also overlook the fact defendants' evidence established, without rebuttal, that it was only plaintiff Rassler's and class member Samaha's amended charges of, respectively, August 24 and 25, 1981, which first put the State on notice (see "Brief for Petitioners" at pp.17-18).

Plaintiffs err when they argue that amended charges of discrimination automatically relate back to initial charges of discrimination. They do not. See, e.g., *Terrell v. U.S. Pipe & Foundary Co.*, 644 F.2d 1112, 1122-24 (Former 5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955 (1982). Rather the question is whether the EEOC treated the initial charge as putting a particular Title VII defendant on notice, and the rule which has developed (at least in the 5th and 11th Circuits) is one of "reasonableness," *Terrell, supra* at 1123-24. In this case there need be no speculation as to whether the EEOC might reasonably have treated the initial charges of plaintiff Rassler and class member Samaha as putting the State on notice, for

defendants have established as a matter of un rebutted fact that the EEOC did not so treat those initial charges.

Specifically, and as fully established in the record cited to at pages 17-18 of the State's initial "Brief for Petitioners," the State had no notice of any sort as to Messrs. Rassler's and Samaha's initial charges of discrimination. Rather the first notice the State had was of their amended August 1981 charges when the EEOC transmitted those amended charges to it by letter dated October 1, 1981. In this regard the EEOC was complying with 42 U.S.C. § 2000e-5(e) which requires it to serve charges "upon the person against whom such charge is made." The fact that the EEOC did not serve Messrs. Rassler's and Samaha's initial charges upon the State means that, as a point of fact, it did not treat such initial charges as involving the State. Thus, because the EEOC did not treat their initial charges as against the State, Mr. Rassler's and Mr. Samaha's August 1981 amended charges of discrimination do not relate back to their earlier initial charges of discrimination, and the State was on notice only from the date of those amended charges.

Finally, and completely independent of the foregoing, plaintiffs take issue with petitioners' counsel's focus upon *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), and the argument based thereon that the class in this case should be limited to only those persons who retired no more than 300 days prior to the July 2, 1982 filing of the initial class action complaint in this cause (see "Brief for Respondents" at p.41 n.18; see also "Brief for Petitioners" at p.47). It is true that the *Crown, Cork & Seal* class limitation argument was never made in the 11th Circuit.



However, the issue as to the proper scope of the class was raised in the 11th Circuit as well as the district court. It was only in the time following the 11th Circuit's decision and before the filing of the "Brief for Petitioners" in this Court that reflection by petitioners' below-indicated counsel of record suggested *Crown, Cork & Seal* directly controlled the class scope limitation issue in this case. As an officer of this Court, with the class scope issue already clearly raised in this case, petitioners' below-indicated counsel of record had a duty to advise it of his view of the correct law (whether helpful or harmful) determinative of such issue, regardless of when such became apparent to him and regardless of whether he urged a different view of the law in the courts below. That is all.

Respectfully submitted,

CHARLES T. COLLETTE  
Counsel of Record  
DOUGLAS A. MANG  
BRUCE A. MINNICK  
Mang, Rett & Collette, P.A.  
Post Office Box 11127  
Tallahassee, FL 32302-3127  
(904) 222-7710

AUGUSTUS D. AIKENS, JR.  
General Counsel  
Florida Department of  
Administration  
435 Carlton Building  
Tallahassee, FL 32399-1550  
(904) 488-4747

*Attorneys for Petitioners*

February 1988

**AMICUS CURIAE**

**BRIEF**

MOTION FILED  
NOV 30 1987

8

No. 86-1685

---

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

---

STATE OF FLORIDA, *et al.*,  
v. *Petitioners,*

HUGHLAN LONG, S. DEWEY HAAS, and CARL RASSLER,  
individually and on behalf of all retired and present male employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, as well as the surviving joint annuitants of any deceased retired male employees,  
*Respondents.*

On a Writ of Certiorari to the United States  
Court of Appeals for the Eleventh Circuit

---

MOTION TO SUBMIT BRIEF AS AMICI CURIAE AND  
BRIEF AMICI CURIAE OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL, THE  
NATIONAL COUNCIL ON TEACHER RETIREMENT,  
AND THE CITY OF NEW YORK  
IN SUPPORT OF THE PETITIONERS

---

ROBERT E. WILLIAMS  
DOUGLAS S. MCDOWELL \*  
GAREN E. DODGE  
MCGUINNESS & WILLIAMS  
1015 Fifteenth Street, N.W.  
Suite 1200  
Washington, D.C. 20005  
(202) 789-8600

*Attorneys for Amici Curiae*

\* Counsel of Record



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

---

No. 86-1685

---

STATE OF FLORIDA, *et al.*,  
v. *Petitioners,*

HUGHLAN LONG, S. DEWEY HAAS, and CARL RASSLER,  
individually and on behalf of all retired and present male employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, as well as the surviving joint annuitants of any deceased retired male employees,

*Respondents.*

---

On a Writ of Certiorari to the United States  
Court of Appeals for the Eleventh Circuit

---

MOTION OF THE EQUAL EMPLOYMENT ADVISORY  
COUNCIL, THE NATIONAL COUNCIL ON  
TEACHER RETIREMENT, AND THE CITY OF  
NEW YORK FOR LEAVE TO SUBMIT BRIEF  
AS AMICI CURIAE

---

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42.3 of the Rules of this Court, the Equal Employment Advisory Council (EEAC), the National Council on Teacher Retirement (NCTR), and the City of New York (City) move this Court for leave to file the accompanying brief as amici

curiae supporting the Petitioners, the State of Florida, *et al.*, in this case. In support of this motion, EEAC, NCTR and the City show as follows:

1. EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. All of EEAC's members are committed firmly to the fair and nondiscriminatory treatment of employees.

2. Substantially all of the Council's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* As employers, many of EEAC's members maintain employer-sponsored pension plans, and thus could be affected by the "devastating results" of retroactive liability of the type imposed by the court of appeals below, estimated by this Court in 1983 to "range from \$817 to \$1,260 million annually for the next 15 to 30 years." *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1106 (1983) (Opinion of Justice Powell).

3. NCTR is a nonprofit organization of 45 state, 13 local and 2 territorial retirement systems, some of

which serve teachers exclusively, others of which include other state and local employee groups. NCTR's member system includes over 5 million active participants. NCTR's mission is to promote the sound and effective administration of public retirement systems in the interest of participants, beneficiaries, and the public. Among other functions, NCTR regularly consults with its members regarding changes in the law that affect them.

4. The City of New York is required by statute to make annual contributions to the five municipal pension funds which provide retirement benefits for the City's employees. The five funds constitute, in the aggregate, the largest public pension fund in the nation. The fact that the City must make contributions to the five systems is dictated by statute. The amount of the City's contribution is calculated on an actuarial basis. In the last fiscal year, the City's pension costs exceeded \$1.5 billion. In accord with this statutory obligation, the City has borne the cost of the benefit and contribution equalization mandated by *Norris and Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). In bringing its pension systems into compliance with Title VII, the City has been guided by its view that this Court's decisions did not mandate any benefit relief to pre-*Norris* retirees. Any departure from that principle would entail major initial costs to the City, which thus has a direct pecuniary stake in this litigation.

5. EEAC is recognized as a broadly-based national organization, and in that capacity has filed amicus curiae briefs in numerous cases before the United States Supreme Court and in all the federal circuit

courts. In fact, because of its interest in the issue of sex-based mortality tables, EEAC filed an amicus curiae brief with the Supreme Court in *Norris*. In addition, EEAC and NCTR filed briefs in this case with the Eleventh Circuit below, and later with this Court in support of the Petition for Certiorari. Additionally, EEAC has filed briefs with this Court in such landmark Title VII cases as *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). As a result, because this case concerns the broad national impact of retroactive relief under Title VII, and because it calls for an important application of the Supreme Court's ruling in *Norris*, EEAC, NCTR and the City are uniquely qualified to present their views to this Court.

6. In several cases, EEAC sought and was granted permission by this Court to file such briefs. *See, e.g., Marino v. Ortiz*, No. 86-1415 (decision pending); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Furnco; Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); and *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977).

7. By order dated October 5, 1987, this Court granted the motion by EEAC and NCTR for leave to file a brief as amici curiae in support of the Petition for a Writ of Certiorari in this case.

8. The written consent of counsel for the Petitioners, the State of Florida, *et al.*, has been filed with the Clerk of the Court. Counsel for the Respondents declined to give consent.

WHEREFORE, it is respectfully moved that EEAC, NCTR and the City be granted leave to file the accompanying brief amici curiae in this case.

Respectfully submitted,

DOUGLAS S. McDOWELL  
MCGUINNESS & WILLIAMS  
1015 Fifteenth Street, N.W.  
Washington, D.C. 20005  
(202) 789-8600

*Counsel for Amici Curiae*

November 30, 1987



## TABLE OF CONTENTS

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	iii
INTEREST OF THE AMICI CURIAE .....	1
STATEMENT OF THE CASE .....	2
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	6

THIS COURT SHOULD REVERSE THE ELEVENTH CIRCUIT'S DECISION BECAUSE IT CONFLICTS DIRECTLY WITH APPLICABLE DECISIONS OF THIS COURT AND WITH REASONED DECISIONS IN OTHER CIRCUITS, BECAUSE RETROACTIVE RELIEF IS UNNECESSARY TO ENSURE THAT EMPLOYERS WILL CONVERT TO UNISEX TABLES, AND BECAUSE THE ELEVENTH CIRCUIT'S DECISION WILL IMPOSE BURDENSOME AND INEQUITABLE RESULTS UPON THE ECONOMY AND INNOCENT THIRD PARTIES .....

6

I. REVERSAL IS NECESSARY BECAUSE THE ELEVENTH CIRCUIT'S IMPOSITION OF RETROACTIVE BACK PAY IS DIRECTLY CONTRARY TO THIS COURT'S HOLDING, IN *NORRIS v. ARIZONA*, THAT *LOS ANGELES v. MANHART* DID NOT PUT EMPLOYERS ON NOTICE THAT USING SEX-BASED ACTUARIAL TABLES TO COMPUTE PENSION BENEFITS VIOLATED TITLE VII .....

6

A. Introduction .....

6

B. *Norris* Held That The 1978 *Manhart* Decision Did Not Put Employers On Notice Of The Impropriety Of Computing Pension Benefits With Sex-Based Actuarial Tables. Employers Were Not Put On Notice Until The *Norris* Decision Established That New Principle Of Law In 1983 .....

8

## TABLE OF CONTENTS—Continued

	Page
1. The Holding In <i>Manhart</i> Was Limited To The Issue Of Unequal Employee Contributions To A Fund, And Did Not Foreshadow The Rule Later Adopted In <i>Norris</i> Regarding Equal Contributions Resulting In Unequal Benefits .....	8
2. The Period Of Confusion In Court And Agency Rulings Between <i>Manhart</i> And <i>Norris</i> Did Not Foreshadow <i>Norris</i> And Did Not Put Employers On Notice .....	9
3. <i>Norris</i> Clarified The Law And Put Employers On Notice Prospectively That Sex-Based Tables Could Not Be Used To Compute Benefits Of Future Retirees .....	18
4. Reasoned Decisions In The Ninth And Second Circuits Reject The Reasoning Of The Eleventh Circuit Below .....	14
II. A RETROACTIVE APPLICATION IS UNNECESSARY TO ENSURE THAT EMPLOYERS WILL CONVERT TO UNISEX TABLES .....	17
III. A RETROACTIVE APPLICATION WOULD IMPOSE BURDENSOME AND INEQUITABLE RESULTS UPON THE ECONOMY AND INNOCENT THIRD PARTIES .....	18
A. A Retroactive Application Would Substantially And Inequitably Burden Retirement Plans And The Economy In General .....	19
B. A Retroactive Application Would Harm Innocent Third Parties .....	22
CONCLUSION .....	24

## TABLE OF AUTHORITIES

Cases:	Page
<i>Albemarle Paper Co. v. Moody</i> , 422 U.S. 405 (1975) .....	20
<i>Arizona Governing Committee v. Norris</i> , 463 U.S. 1073 (1983), <i>on remand</i> , 796 F.2d 1119 (9th Cir. 1986) .....	<i>passim</i>
<i>Chevron Oil Co. v. Huson</i> , 404 U.S. 97 (1971) .....	17
<i>EEOC v. Colby College</i> , 589 F.2d 1139 (1st Cir. 1978) .....	11
<i>Graham v. State of New York</i> , 43 FEP Cases 174 (S.D.N.Y. Feb. 17, 1987), <i>motion for reargument denied</i> , 664 F.Supp. 166 (S.D.N.Y. July 21, 1987), <i>appeal pending</i> .....	16
<i>Hannahs v. New York State Teachers' Retirement System</i> , 26 FEP Cases 527 (S.D.N.Y. 1981), <i>later decision</i> , No. 78 Civ. 2541-CSH (S.D.N.Y. 1987), <i>appeal pending</i> .....	16
<i>Long v. State of Florida</i> , No. TCA 82-1056-09, <i>aff'd</i> , 805 F.2d 1542 (1986), <i>reh'g denied</i> , 805 F.2d 1552 (11th Cir. 1987), <i>cert. granted</i> (No. 86-1685), 52 U.S.L.W. 3206 .....	<i>passim</i>
<i>Los Angeles Department of Water and Power v. Manhart</i> , 435 U.S. 702 (1978) .....	<i>passim</i>
<i>Peters v. Wayne State University</i> , 691 F.2d 235 (6th Cir. 1982), <i>remanded in light of Norris</i> , 463 U.S. 1223, <i>remanded to district court</i> , 718 F.2d 1100 (6th Cir. 1983) .....	10
<i>Probe v. State Teachers' Retirement System</i> , 780 F.2d 776 (9th Cir.), <i>cert. denied</i> , 106 S.Ct. 2891 (1986) .....	3-4, 5, 9, 14-17
<i>Retired Public Employees' Ass'n v. California</i> , 614 F.Supp. 571 (N.D. Cal. 1984), <i>rev'd</i> , 799 F.2d 511 (9th Cir. 1986) .....	15, 16, 20
<i>Sobel v. Yeshiva University</i> , 566 F.Supp. 1166 (S.D.N.Y. 1983), <i>rev'd on other grounds</i> , 797 F.2d 1478 (2d Cir. 1986), <i>later decision</i> , 656 F.Supp. 587 (S.D.N.Y. 1987) .....	10

## TABLE OF AUTHORITIES—Continued

	Page
<i>Spirit v. Teachers Insurance and Annuity Ass'n</i> , 475 F.Supp. 1298 (S.D.N.Y. 1979), <i>affirmed as modified</i> , 691 F.2d 1054 (2d Cir. 1982), <i>vacated</i> , 463 U.S. 1223 (1983), <i>on remand</i> , 735 F.2d 23 (2d Cir.), <i>cert. denied</i> , 469 U.S. 881 (1984), <i>later proceeding</i> , 5 E.B.C. 2515 (S.D.N.Y. 1984) ----	5, 10, 16
<i>Statute:</i>	
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e <i>et seq.</i> -----	<i>passim</i>
<i>Miscellaneous:</i>	
Amicus Curiae Brief of the American Academy of Actuaries in <i>Norris</i> -----	21-22
United States Department of Labor, Cost Study of the Impact of an Equal Benefits Rule on Pen- sion Benefits (1983) -----	11, 20

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

\_\_\_\_\_  
No. 86-1685  
\_\_\_\_\_

STATE OF FLORIDA, *et al.*,  
v. *Petitioners*,

HUGHLAN LONG, S. DEWEY HAAS, and CARL RASSLER,  
individually and on behalf of all retired and pres-  
ent male employees subject to the Florida Retire-  
ment System established by Chapter 121, Florida  
Statutes, as well as the surviving joint annuitants  
of any deceased retired male employees,  
*Respondents.*

On a Writ of Certiorari to the United States  
Court of Appeals for the Eleventh Circuit

BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT  
ADVISORY COUNCIL, THE NATIONAL COUNCIL ON  
TEACHER RETIREMENT, AND THE CITY OF  
NEW YORK IN SUPPORT OF THE PETITIONERS

The amici respectfully submit this brief as amici  
curiae in support of the Petitioners, the State of  
Florida, *et al.* The motion of the amici to file this  
brief is attached, and the written consent of the State  
of Florida has been filed with the Clerk of the Court.

**INTEREST OF THE AMICI CURIAE**

The interest of the amici is set forth fully in the  
accompanying motion.



### STATEMENT OF THE CASE

The State of Florida administers the Florida Retirement System (FRS), a defined benefit plan established to provide state employees and their beneficiaries an annuity upon retirement. Under the FRS plan used until August 1, 1983, Florida calculated the present value of an employee's optional benefits upon retirement by using sex-based mortality tables.<sup>1</sup> Since women, as a group, live longer than men and would receive benefits over a longer period of time, the State thus calculated the present value of a typical man's annuity plan to have a lower present value than a woman's. As a result, the sex-based tables, applied to optional benefit forms, resulted in a lower monthly benefit paid to men than to similarly situated women.

Hughlan Long and other male members of FRS sued the State of Florida under Title VII of the Civil Rights Act of 1964, challenging the State's use of the sex-based mortality tables. The district court found that the practice constituted unlawful sex discrimination, and awarded back pay with interest *retroactive* to October 1, 1978. Thus, the court imposed retroactive liability prior to the effective date of *Norris* (August 1, 1983), as well as liability for future payments (which *also* amounts to retroactive liability<sup>2</sup>),

<sup>1</sup> The standard benefit, a straight life annuity, was and is identical for men and women. Upon the effective date of the *Norris* decision, Florida brought FRS into total compliance.

<sup>2</sup> Requiring the topping up of payments to all Subclass A retirees as of the date of the judgment, as well as the topping up of benefits with interest from October 1, 1978 to the date of judgment for all Subclass A retirees who retired after

even though both *Norris* and *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978) declined to award such retroactive relief. The lower court did not follow those holdings, reasoning that "the state was on notice at least from the date of *Manhart* [April 25, 1978] that the use of sex-based mortality tables was impermissible." Slip. op. at 31.

The Eleventh Circuit, in affirming the trial court decision, first rejected the State's argument that its use of sex-based tables was permissible until 1983. The court reasoned that the FRS was put on notice when *Manhart* was decided, even though *Manhart* had established an "open market" exception in 1978, permitting employers to make available annuities offered by insurance companies on the open market, an exception which was not overruled until the 1983 *Norris* decision. In finding that the State should not have relied on this open market exception, the Eleventh Circuit expressly rejected the Ninth Circuit's contrary reasoning in *Probe v. State Teachers' Retire-*

October 1, 1978, both constitute retroactive relief. The *Norris* Court stated:

"When a court directs a change in benefits based on contributions made before the court's order, the court is awarding relief that is fundamentally retroactive in nature. This is true because retirement benefits under a plan such as that at issue here represent a *return on contributions which were made during the employee's working years and which were intended to fund the benefits without any additional contributions from any source after retirement.*" (Emphasis supplied). *Norris*, 463 U.S. at 1092.

The past and future payments to the class were based on contributions by the State of Florida before August 1, 1983 and, therefore, the increase in the benefits is retroactive relief, the cost of which will be solely borne by the State of Florida.

*ment System*, 780 F.2d 776 (9th Cir.), *cert. denied*, 106 S.Ct. 2891 (1986) as "wrong as a matter of law." 805 F.2d at 1548.

The court then found that the FRS was liable for benefits retroactive to 1978, reasoning that while the impact "on pension funds and innocent third parties may be burdensome, it will not be devastating." *Id.* at 1550. The court explained this reasoning by citing the fact that Florida has a "surplus in the fund of over \$200 million . . . As a result the impact [of the \$43.6 million judgment] on Florida taxpayers is not great." *Id.* at 1551. Similarly, the appeals court declined to consider evidence of the impact on pension funds at the national level. The appeals court explained that *Manhart* put "all pension funds on notice" that benefits could not be based on sex-distinct mortality tables; "all funds, like the FRS, were forewarned and should have converted to sex-neutral mortality tables at that time. The impact on those pension funds that failed to follow the law after *Manhart* should not be considered here." *Id.*

#### SUMMARY OF ARGUMENT

This Court should reverse the decision of the Eleventh Circuit because it imposed retroactive relief in direct conflict with this Court's decision in *Norris*, which held that "only benefits derived from contributions collected after the effective date of the judgment [August 1, 1983] need be calculated without regard to the sex of the employee." *Norris* at 1107, n.12 (Powell, J.). Clearly, this Court's 1978 decision in *Manhart* did not put employers on notice that sex-based actuarial tables could not be used to compute pension benefits, because *Manhart*, a case which dealt only with the issue of unequal contributions to a fund,

in fact established an "open market" exception, which was not overruled until *Norris*. In addition, employers were not put on notice until *Norris* because lower court rulings gave conflicting opinions about the effect of *Manhart*. Thus, the new rule of law prohibiting pension benefits calculated with sex-based actuarial tables was not established until *Norris*, a rule not foreshadowed until its issuance in 1983.

In addition, reversal is necessary because the Eleventh Circuit's decision conflicts directly with the reasoned decisions in other circuits. Specifically, the court below rejected *Probe v. State Teachers' Retirement System*, a Ninth Circuit case directly on point, calling it "wrong as a matter of law." 805 F.2d at 1548. The decision below also conflicts with the reasoning by the Second Circuit in *Spirit v. Teachers Insurance and Annuity Ass'n*, 735 F.2d 23 (2d Cir.), *cert. denied*, 469 U.S. 881 (1984), a case which noted that *Norris* would seem to "foreclose any possibility of the retroactive imposition of added financial burdens upon employers or plans." 735 F.2d at 29.

The Eleventh Circuit's decision also should be reversed because a retroactive award is unnecessary to convince employers to convert to unisex tables. Rather, as a result of *Norris*, employers already have abandoned the use of sex-based tables without the imposition of this unnecessary relief.

Finally, reversal is necessary because retroactive relief would impose burdensome and inequitable results upon other retirement plans and innocent third parties. In fact, Justice Powell, in his opinion in *Norris*, cited an industry-wide Department of Labor Study which estimated that the effect of retroactive liability on the economy "would range from \$817 to



\$1,260 million annually for the next 15 to 30 years," *id.* at 1106, a consideration which, contrary to the view of the Eleventh Circuit below, 805 F.2d at 1551, cannot properly be dismissed as irrelevant in deciding an issue of retroactivity.

### ARGUMENT

**THIS COURT SHOULD REVERSE THE ELEVENTH CIRCUIT'S DECISION BECAUSE IT CONFLICTS DIRECTLY WITH APPLICABLE DECISIONS OF THIS COURT AND WITH REASONED DECISIONS IN OTHER CIRCUITS, BECAUSE RETROACTIVE RELIEF IS UNNECESSARY TO ENSURE THAT EMPLOYERS WILL CONVERT TO UNISEX TABLES, AND BECAUSE THE ELEVENTH CIRCUIT'S DECISION WILL IMPOSE BURDENSOME AND INEQUITABLE RESULTS UPON THE ECONOMY AND INNOCENT THIRD PARTIES**

**I. REVERSAL IS NECESSARY BECAUSE THE ELEVENTH CIRCUIT'S IMPOSITION OF RETROACTIVE BACK PAY IS DIRECTLY CONTRARY TO THIS COURT'S HOLDING, IN *NORRIS v. ARIZONA*, THAT *LOS ANGELES v. MANHART* DID NOT PUT EMPLOYERS ON NOTICE THAT USING SEX-BASED ACTUARIAL TABLES TO COMPUTE PENSION BENEFITS VIOLATED TITLE VII**

#### A. Introduction

The decision by the Eleventh Circuit is in direct conflict with the decision by this Court in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983). There, this Court, addressing "all employer-sponsored pension funds," held:

that all retirement benefits derived from *contributions made after the decision today* must be calculated without regard to the sex of the beneficiary. . . . The Court further holds that benefits

derived from *contributions made prior to this decision may be calculated as provided by the existing terms of the Arizona plan.* . . . The Clerk is directed to issue the judgment August 1, 1983.

463 U.S. at 1074-75 (*per curiam*) (emphasis supplied). Significantly, *Norris* also determined that employers "reasonably could have assumed" that their pension programs were lawful after *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), and that a retroactive application would have devastating results on the operation of the economy. 463 U.S. at 1105-06 & n.12 (Powell, J.), referring to 463 U.S. at 1109-10 (O'Connor, J., concurring).

As shown below, the Eleventh Circuit reasoned, in direct conflict with *Norris*, that the FRS was liable starting in 1978:

First, *the system knew or should have known since the Supreme Court's decision in Manhart that any benefits based on sex-distinct mortality tables was impermissible under Title VII.* Second, the award of retroactive relief would not "retard the operation" or "frustrate the purpose" of Title VII. The system's argument that retroactive relief is not needed to encourage it and other employers to follow this "new" interpretation of Title VII is unpersuasive. Third, *although the impact on pension funds and innocent third parties may be burdensome, it will not be devastating.*

805 F.2d at 1550 (emphasis supplied). Accordingly, in order to bring the Eleventh Circuit in line with this Court's prior ruling, this Court is requested to reverse the decision of the court below.



**B. Norris Held That The 1978 *Manhart* Decision Did Not Put Employers On Notice Of The Impropriety Of Computing Pension Benefits With Sex-Based Actuarial Tables. Employers Were Not Put On Notice Until The *Norris* Decision Established That New Principle Of Law In 1983.**

**1. *The Holding In Manhart Was Limited To The Issue Of Unequal Employee Contributions To A Fund, And Did Not Foreshadow The Rule Later Adopted In Norris Regarding Equal Contributions Resulting In Unequal Benefits***

The Eleventh Circuit below found that the FRS "knew or should have known since the Supreme Court's decision in *Manhart* that any benefits based on sex-distinct mortality tables was impermissible under Title VII." 805 F.2d at 1550. This finding is in clear conflict with both *Manhart* and *Norris*.

In 1978, this Court established the new principle of law that sex-based actuarial tables could not be used to require unequal employee contributions to a pension fund to provide equal payouts upon retirement. *Manhart*, 435 U.S. 702. Since this was the "first litigation challenging contribution differences based on valid actuarial tables," *id.* at 722, employers thus were put on notice for the first time by the Court in 1978 that the use of actuarially sound tables in computing contributions was discriminatory. In fact, this Court seemingly went out of its way to emphasize that it did not intend Title VII to "revolutionize the insurance and pension industries." *Id.* at 717. In doing so, the Court adopted an "open market" exception as follows:

All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund. Nothing in our holding implies that it would be unlawful

for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.

*Id.* at 717-18 (footnote omitted).

It was this language which sparked active debate regarding *Manhart*'s application to a defined benefit plan, the type of plan involved herein. *Manhart*, in fact, seemed to sanction plans with equal "contributions," but which paid annuities as would a private insurer.<sup>3</sup> Accordingly, employers like the FRS should not be imputed the knowledge that "any benefits based on sex-distinct mortality tables" were illegal, the rule imposed by the Eleventh Circuit below at 1550. On the contrary, an employer reasonably could have assumed that it was lawful to "make available to its employees annuities offered by insurance companies on the open market." *Norris*, 463 U.S. at 1106; see *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 782-83 (9th Cir.), *cert. denied*, 106 S.Ct. 2891 (1986).

**2. *The Period Of Confusion In Court And Agency Rulings Between Manhart And Norris Did Not Foreshadow Norris And Did Not Put Employers On Notice***

In the subsequent five years until the decision in *Norris*, the courts, federal agencies and employers wrestled with the applicability of *Manhart* and the open market exception. For example, while one court distinguished discrimination in contributions from

<sup>3</sup> Contrary to holdings of the courts below, *Manhart* and the cases interpreting it did not limit the "open market exception" to those employers who retained third party insurers to provide their pension benefits. See n.7, *infra* at p. 15.

discrimination in benefits, *Peters v. Wayne State University*, 691 F.2d 235 (6th Cir. 1982), remanded in light of *Norris*, 463 U.S. 1223, remanded to district court, 718 F.2d 1100 (6th Cir. 1983), other courts held that "classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage." See *Norris* at 1081.<sup>4</sup> Ultimately, however, no court in the five years after *Manhart* decided whether Title VII permitted payment of equal benefits to men and women under one benefit scheme, but also permitted an optional benefit plan which calculated benefits

<sup>4</sup> The district court in *Sobel v. Yeshiva University*, 566 F. Supp. 1166 (S.D.N.Y. 1983), rev'd on other grounds, 797 F.2d 1478 (2d Cir. 1986), later decision, 656 F.Supp. 587 (S.D.N.Y. 1987), interpreted the Second Circuit's 1982 decision in *Spirt* to outlaw a payment of unequal benefits. *Spirt v. Teachers Insurance and Annuity Association*, 475 F.Supp. 1298 (S.D.N.Y. 1979), affirmed as modified, 691 F.2d 1054 (2d Cir. 1982), vacated, 463 U.S. 1223 (1983), on remand, 735 F.2d 23 (2d Cir.), cert. denied, 469 U.S. 881 (1984), later proceeding, 5 E.B.C. 2515 (S.D.N.Y. 1984). The court in *Sobel*, however, obviously was concerned about following *Spirt* before the Supreme Court could decide *Norris*. *Sobel* stated:

Whether the Supreme Court will retreat from its *Manhart* holding or offer some reasonable means of applying it in a nondiscriminatory fashion remains to be seen. In any case, the Court is almost certain to comment upon several types of distribution options which have been offered to avoid a *Manhart* problem. Thus, because the matter of a proper solution to the pension issue in light of *Manhart* has been a continually troubling one . . . this Court will defer deciding upon the appropriate remedy in this case until such time as the Supreme Court has decided *Norris*, and, if certiorari is granted, *Spirt*.

*Sobel*, 566 F.Supp. at 1192 (footnote omitted). The later *Sobel* decisions, by the Second Circuit in 1986, and on remand in 1987, did not address the issue.

using sex-based actuarial tables used by private insurers. In fact, in *EEOC v. Colby College*, 589 F.2d 1139, 1146 (1st Cir. 1978), Chief Judge Coffin's concurring opinion speculated that it might be proper under Title VII to include within an optional pension plan "unequal, actuarially sound pension and life insurance benefits for participating men and women."

It also is clear that many employers were uncertain about the precise applicability of *Manhart* and its progeny. More importantly, it is evident that employers felt that they were not put on notice to disregard sex-based actuarial tables in all respects. Indeed, in 1983 the United States Department of Labor prepared a Cost Study of the Impact of an Equal Benefits Rule on Pension Benefits ("DOL Study").<sup>5</sup> That study found that "[s]ubstantial percentages of both [defined benefit and defined contribution] plans follow the customary insurance industry practice of using sex-segregated mortality tables in calculating annuity benefits." DOL Study at 2. Significantly, the DOL Study found that 45% of defined benefit plans and 74% of defined contribution plans still used sex-based tables to compute benefits at the time of the study's publication in January, 1983, *id.*, thus underscoring the potential impact of the Eleventh Circuit's decision.

It is clear, therefore, that the court below erred in disregarding the uncertainty in the law that existed between 1978 and 1983 when it reasoned as follows:

First, although *Manhart* only addressed contributions to a pension plan, its reasoning applies equally to benefits paid out under a pen-

<sup>5</sup> The DOL study was proffered as Defendant's Proffered Exhibit 10A-1 in the case herein.



sion plan. Second, and most important, the open market exception applies exclusively to third parties, and, therefore, a *reasonable employer knew or should have known that its own optional annuity plans based on sex-distinct mortality tables were impermissible* under Title VII.

805 F.2d at 1548 (emphasis supplied). Despite the Eleventh Circuit's reasoning to the contrary, it is clear that no employer, fund administrator or federal judge had available the crystal ball that would enable them to read the *Norris* decision before its issuance. That reading was unavailable until 1983.

**3. *Norris Clarified The Law And Put Employers On Notice Prospectively That Sex-Based Tables Could Not Be Used To Compute Benefits Of Future Retirees***

In fact, it was on July 6, 1983, that Justice Powell, writing for the majority on the question of relief, found that the narrow decision in *Manhart* did not provide notice to employers that would warrant retroactive application of the *Norris* ruling. *Norris* at 1105-6. He explained that, after *Manhart*, "an employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market." *Id.* at 1106. It was not until *Norris*, Justice Powell noted, that employers learned that *Manhart*'s "open market" exception would not insulate from liability an employer that offered several annuity options which were "actuarially equivalent" by using sex-based mortality tables.<sup>6</sup>

<sup>6</sup> Indeed, the most significant proof that pension administrators were justified in their belief that the use of sex-distinct mortality tables was still proper up until *Norris* was

The majority of this Court in *Norris*, in holding that relief was only applicable prospectively (i.e., only to contributions made on or after August 1, 1983), made it absolutely clear that this principle was a blanket rule applicable to all non-*Manhart* type plans. Justice Powell was concerned with the possible devastating effect of a retroactive ruling on *all* pension plans. Therefore, the majority ruled that as to *all* employer-sponsored pension plans, contributions and/or accruals made on or after August 1, 1983 must be treated in a sex-neutral fashion.

In fact, Justice Powell stated as follows:

As in *Manhart*, holding employers liable retroactively would have devastating results. *The holdings applies to all employer-sponsored pension plans*, and the cost of complying with the District Court's award of retroactive relief would range from \$817 to \$1,260 million annually for the next 15 to 30 years. [Citation and footnote omitted.] In this case, the cost would fall on the State of Arizona. *Presumably other state and local governments also would be affected directly by today's decision. Imposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits. Income, excise and property taxes are being increased. There is no justification for this Court, particularly in view of the question left open in Manhart, to impose this magnitude of burden retroactively on the public. Accordingly, liability should be prospective only.*

*Norris* at 1106-7 (emphasis supplied).

decided is the fact that four justices of the Supreme Court in *Norris* still believed that the use of sex-distinct tables did not violate Title VII.



This Court did not decide *Norris* on the basis of the narrow facts before it. Retroactive liability in *Norris* would have been minuscule because retroactive damages would have been paid to a class of only four women—the four plan participants who had retired and chosen a life-time annuity. Plainly, it was not the potential impact of the Arizona Governing Committee's having to pay retroactive damages to four participants that moved the Court to rule that liability upon *all* pension plans across the United States. Thus, it is clear that the *Norris* Court established a blanket rule of prospective liability.

Clearly, therefore, employers were not put on notice of the proper use of unisex tables until *Norris*. Plan administrators, who have fiduciary duties, and who must keep the fund "actuarially sound," clearly cannot respond to speculative or unclear interpretations of the law. Accordingly, this Court should reject the Eleventh Circuit's theory of "constructive notice," and instead acknowledge that the law was unclear, and that *Manhart* and its confused aftermath did not sufficiently "foreshadow" *Norris* to justify a retroactive application of its holding.

#### **4. Reasoned Decisions In The Ninth And Second Circuits Reject The Reasoning Of The Eleventh Circuit Below**

It is also clear that this Court should reverse the decision of the Eleventh Circuit because it conflicts directly with the reasoned decisions in the other circuits that have addressed the issue. In *Probe v. State Teachers' Retirement System*, 780 F.2d 776, a decision involving similar facts arising under a similar state-administered plan, a unanimous panel of the Ninth Circuit confirmed that the *Norris* prohibition

of retroactive relief applied to defined benefit plans. *Probe*, 780 F.2d at 788. The Ninth Circuit then held:

While *Manhart* put all employer-operated pension funds on notice that they could not require men and women to make unequal contributions to the fund, it expressly held that an employer could set aside equal contributions and let each retiree purchase whatever benefit is available on the "open market." 435 U.S. at 717-18, 98 S.Ct. at 1380. Thus, STRS reasonably could have assumed that it was lawful to provide an optional annuity system that reflected plans offered by insurance companies on the open market. Under these circumstances, we conclude that full retroactive relief is not appropriate.

*Id.* at 782-83.<sup>7</sup>

In fact, the Ninth Circuit reaffirmed its *Probe* decision in *Retired Public Employees' Ass'n (RPEA) v. California*, 799 F.2d 511 (9th Cir. 1986), a case which again involved a state-operated and administered plan like the plan herein. In *RPEA*, the Ninth Circuit found *Probe* "dispositive," calling an equalization in benefits for employees who retired before the

---

<sup>7</sup> As *Probe* made clear, *Manhart* and the cases interpreting it did not limit the "open market exception" to those employers who retained third party insurers to provide their pension benefits. For example, insurance companies were not involved in applying sex-based actuarial tables in *Probe*; rather that system, like FRS herein, was self-insured. Even so, the court in *Probe* held that the employer "reasonably could have assumed that it was lawful to provide an optional annuity system that reflected plans offered by insurance companies on the open market." *Probe*, 780 F.2d at 782-783 (emphasis supplied).

state's switch to unisex tables "fundamentally retroactive." *Id.* at 515. Significantly, the court below ignored the *RPEA* decision and directly rejected *Probe*—specifically calling it "wrong as a matter of law." 805 F.2d at 1598.

In addition, the decision by the Eleventh Circuit below conflicts with a decision by the Second Circuit, *Spirt v. Teachers Insurance and Annuity Ass'n*, 735 F.2d 23 (2d Cir. 1984), *cert. denied*, 469 U.S. 881 (1984). While *Spirt* awarded retroactive relief, that court recognized that the plan was unique because participants had no "settled expectations as to the amount of monthly benefits" and that the plans do not guarantee retirees a "certain stream of income." 735 F.2d at 27, 28. In contrast, the FRS plan guarantees its retirees a fixed amount at retirement.

Further, *Spirt* noted that *Norris* would seem to "foreclose any possibility of the retroactive imposition of added financial burdens upon employers or plans," 735 F.2d at 29 (emphasis supplied), while added financial burdens clearly would result in the instant case, the reasoning of the court below notwithstanding. See *Hannahs v. New York State Teachers' Retirement System*, No. 78 Civ. 2541-CSH at 8 (S.D.N.Y. March 9, 1987), *earlier decision*, 26 FEP Cases 527 (S.D.N.Y. 1981), *appeal pending* (*Spirt* "makes crystal clear that where a guaranteed payment may be identified, *Norris* precludes retroactive relief based on unisex tables which would impose a financial burden upon the plan") (emphasis in original). But cf. *Graham v. State of New York*, 43 FEP Cases 174, 179-80 (S.D.N.Y. Feb. 17, 1987), *motion for reargument denied*, 664 F.Supp. 166 (S.D.N.Y. July 21, 1987), *appeal pending* (permitting retroactive relief where unequal "contributions,"

in the form of sick leave credits, were computed with sex-based tables).

Accordingly, it is clear that the decision of the Eleventh Circuit is wrong, and it should be reversed.

## II. A RETROACTIVE APPLICATION IS UNNECESSARY TO ENSURE THAT EMPLOYERS WILL CONVERT TO UNISEX TABLES

Another reason this Court should reverse the Eleventh Circuit's decision is that retroactive application will not "further" the operation of Title VII. See *Norris* at 1110;<sup>\*</sup> *Probe* at 783. *Manhart*, according to Justice O'Connor, "held that a central purpose of Title VII is to prevent employers from treating individual workers on the basis of sexual or racial group characteristics." *Norris* at 1110. But that central purpose, according to the Justice, "in no way requires retroactivity." *Id.* Justice O'Connor explained:

*I see no reason to believe that a retroactive holding is necessary to ensure that pension plan administrators, who may have thought until our decision today that Title VII did not extend to plans involving third-party insurers, will not now quickly conform their plans to insure that individual employees are allowed equal monthly benefits regardless of sex.*

*Id.* (emphasis supplied).

Similarly, the argument that retroactive backpay is necessary to further Title VII's goal of eliminating

<sup>\*</sup> In his majority opinion at n.12, Justice Powell refers to Justice O'Connor's concurring opinion, 463 U.S. at 1107-1111. In that concurring opinion, Justice O'Connor, relying upon *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), considered whether "retroactivity will further or retard the operation" of Title VII. *Id.* at 1110.



sex discrimination also was rejected by Justice Stevens, who wrote for the majority in *Manhart*. Relying on the "equitable nature of Title VII remedies" and the complexity of the sex-based annuities issue generally, he stated: "There is no reason to believe that the threat of a backpay award is needed to cause other administrators to amend their practices to conform to this decision." 435 U.S. at 720-21.

Justice O'Connor's prediction that employers would "quickly conform" their plans after *Norris* has been achieved. It is the experience of the amici and their respective constituencies that the employer community has in fact changed their pension practices to conform to the *Norris* decision. Indeed, this response to *Norris* by employers in general is reflected in the facts herein. While Florida did not convert to unisex tables after *Manhart* because of the confusion and uncertainty surrounding the law at the time, the State did convert completely on August 1, 1983, the effective date of *Norris*.

Accordingly, given this movement to adopt unisex tables after *Norris* by the State of Florida and employers generally, it is unnecessary to impose retroactive damages to ensure compliance with Title VII. Thus, retroactive liability will not further the goals of Title VII.

### III. A RETROACTIVE APPLICATION WOULD IMPOSE BURDENSOME AND INEQUITABLE RESULTS UPON THE ECONOMY AND INNOCENT THIRD PARTIES

An additional reason exists for this Court to reverse the decision of the court below. Specifically, a retroactive award would impose burdensome and in-

equitable results, a fact recognized by this Court in *Norris*, where the Court commented that:

There is no justification for this Court, particularly in view of the question left open in *Manhart*, to impose this magnitude of burden retroactively on the public. Accordingly, liability should be prospective only.

*Norris*, 463 U.S. 1073 at 1107 (Powell, J.; footnote omitted). Accordingly, despite the Eleventh Circuit's finding to the contrary, 805 F.2d at 1551, a court properly should examine any award of retroactive relief for its effects on other retirement plans, the economy in general, and on innocent third parties. See *Manhart* at 721-22 & n.42.

#### A. A Retroactive Application Would Substantially And Inequitably Burden Retirement Plans And The Economy In General

The Eleventh Circuit, noting that the FRS has a "surplus in the fund of over \$200 million," found that the impact of its \$43.6 million judgment "is not great." 805 F.2d at 1551. The court then concluded that "the district court's refusal to consider evidence of the impact on pension funds on the national level was also not in error," and that the "impact on those pension funds that failed to follow the law after *Manhart* should not be considered here." *Id.*

Clearly the Eleventh Circuit improperly limited its inquiry to the impact on the local economy when the inquiry is properly one of national scope. In this regard, this Court found it essential, instead, to gauge "the potential impact which changes in rules affecting insurance and pension plans may have on the economy." *Manhart*, 435 U.S. at 721. In *Manhart*,



the Court noted that "[f]ifty million Americans participate in retirement plans other than Social Security," and that "[t]he assets held in trust for these employees are vast and growing—more than \$400 billion was reserved for retirement benefits at the end of 1976 and reserves are increasing by almost \$50 billion a year." *Id.* (footnote omitted). Accordingly, the Court stated that it "cannot base a ruling on the facts of this case alone." *Id.* at n.42. Rather, "[i]mportant national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.'" *Id.* (emphasis supplied), quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). See *RPEA*, 799 F.2d at 515.

In *Norris*, Justice Powell, writing for the majority on the question of retroactive relief, discussed the economic impact a retroactive rule would have on the economy. He stated that cost of complying with the district court's retroactive award in *Norris* "would range from \$817 to \$1,260 million annually for the next 15 to 30 years." *Norris* at 1106, citing DOL Study at 32. Further, Justice Powell stated that "the minimum additional cost necessary to equalize benefits prospectively would range from \$85 to \$93 million each year for at least the next 15 years," a much lower cost than retroactive relief, but still a cost that is "prohibitive." *Norris* at 1095, n.1 (emphasis supplied).

Significantly, Justice Powell added that "[i]mposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits."

*Norris* at 1106-07.<sup>9</sup> Since "[i]ncome, excise and property taxes" would thus have to be levied, Justice Powell concluded that there "is no justification . . . particularly in view of the question left open in *Manhart*, to impose this magnitude of burden retroactively on the public." *Id.* at 1107. Similar costs of benefit plans are of concern to private employers who also must receive increased contributions—either from their own resources or from employees—to fund retroactive relief of the type ordered below.

This prediction of vast economic harm to pension plans and the economy in general is echoed in the amicus brief prepared by the American Academy of Actuaries supporting the Petition for a Writ of Certiorari in *Norris*. In that brief, the Academy stated

---

<sup>9</sup> The City of New York, one of the amici herein, funds five of the nation's largest retirement systems. During the last fiscal year, the City's contributions to the New York City Employees' Retirement System, the Teacher's Retirement System, the Board of Education Retirement System, the Police Pension Fund, and the Firefighter Department Pension Fund was in excess of \$1.5 billion. Each of these retirement systems equalizes benefits for all members who retired on or after August 1, 1983, the date mandated by the *Norris* decision. The cost to the City of implementing the *Norris* decision was considerable.

It has been estimated that the cost of benefit equalization for those persons retiring between April 1, 1978 and August 1, 1983 would be in the hundreds of millions of dollars. This cost will come directly out of the City's available resources. It will impose a serious financial burden at a time when the City has imposed a freeze on new hiring in anticipation of a financial downturn precipitated by the recent change in the financial markets. If the City has to bear these additional costs, the funds could only come from the discretionary portion of the budget, i.e., the monies allocated for the delivery of sanitation, fire-fighting, police and other uniformed services.

that retroactive liability would affect the structure and assets of defined benefit plans consisting of "the largest part" of "trusteed pension and profit sharing plans," which amount to \$256,898,000,000.<sup>10</sup>

Accordingly, it is clear that retroactive liability like that imposed by the court below is inequitable, and could substantially threaten the solvency of pension benefits throughout the economy.

#### B. A Retroactive Application Would Harm Innocent Third Parties

This Court also considers important the effect that retroactive application would have on *third parties*, a factor the Eleventh Circuit essentially discounted, calling the effect "burdensome" but not "devastating." 805 F.2d at 1550. In contemplating the propriety of retrospective relief, the Court in *Manhart* thus noted that "[d]rastic changes in the legal rules governing pension and insurance funds" could "jeopardize[] the insurer's solvency and, ultimately, the insureds' bene-

<sup>10</sup> The Academy stated in its brief in *Norris* as follows:

*Statistics* compiled by the American Council of Life Insurance indicate that by the end of 1980 the assets of trusted pension and profit sharing plans amounted in the aggregate to \$256,898,000,000. American Council of Life Insurance, 1981 Pension Facts 19. By far the largest part of this huge sum is held under defined benefit pension plans. These plans are ordinarily adopted by larger and medium-sized corporations. They have, for the most part, provided for pensions in identical monthly amounts for similarly situated retired men and women employees. Title VII is likely to affect such plans to the extent that they provide optional forms of retirement benefits, however, since such annuity options are often based on sex-distinct factors.

Brief at 4, n.2.

fits." *Manhart* at 721. In concluding that retrospective relief was inappropriate, the Court noted that "[r]etroactive liability could be *devastating* for a pension fund. The harm would fall in large part on *innocent third parties*." *Id.* at 722-23 (emphasis supplied; footnote omitted).

Accordingly, the same harm could befall third parties where *benefits* are concerned that befell the third parties affected by the change in contributions in *Manhart*: "If the reserve proves inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future security but also for the unanticipated reduction in the contributions of past employees." *Id.* at 723. See *Norris* at 1110.

The potential harm to innocent third parties in this case is evident in the arguments advanced by the state of Florida.<sup>11</sup> But more importantly, innocent

<sup>11</sup> As the State of Florida argues, retroactive relief will affect the FRS significantly. There are 1,100 employers who presently participate in FRS, of which the State Government is but one. See Affidavit of Andrew J. McMullian, III (Doc. #53). Other participants include counties, school districts and municipalities. These units of local government are distinct from State Government, but are required to participate in FRS, and do not control benefit or funding decisions. Accordingly, an award of retroactive relief would have a significant effect on those local governmental units and the citizenry which they serve, the "innocent third parties" that should be protected by the courts.

In fact, the valuation report of Tillinghast, Nelson and Warren, supplied to the Eleventh Circuit by Notice of Filing dated March 20, 1984 (Doc. #2714), estimates that if the plaintiffs are awarded the full retroactive topping up relief sought, the liability imposed upon units of local government would be \$140,790,000. The liability to Dade County alone



third parties in *future* cases will be injured should the decision of the court below be allowed to stand. Accordingly, this Court is requested to reverse the award of retroactive relief ordered by the court, including both the topping up of past and future payments to all Subclass A retirees as of the date of the judgment, as well as topping up of benefits with interest from October 1, 1978 to the date of judgment for all Subclass A retirees who retired after October 1, 1978.

#### CONCLUSION

For the foregoing reasons, the amici respectfully urge this Court to reverse the decision of the United States Court of Appeals for the Eleventh Circuit below.

Respectfully submitted,

ROBERT E. WILLIAMS  
DOUGLAS S. McDOWELL \*  
GAREN E. DODGE  
McGUINNESS & WILLIAMS  
1015 Fifteenth Street, N.W.  
Suite 1200  
Washington, D.C. 20005  
(202) 789-8600

*Attorneys for Amici Curiae*

\* Counsel of Record

November 30, 1987

---

would be \$29,700,000. The contributions from units of local government to amortize that liability over thirty years is estimated to be \$625,184,000. While the Florida legislature has since changed the amortization period to fifteen years, and while the Tillingshast valuation report was based on a higher dollar amount than is currently at issue, it is clear Justice Powell's estimates of the general impact of the economic effect of applying *Norris* retroactively still may have to be adjusted upwards to a significant degree.